(16,444.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 269.

THE VILLAGE OF NORWOOD, APPELLANT,

vs.

ELLEN R. BAKER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

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1 THE UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, } *ss:*

At a stated term of the circuit court of the United States of America within and for the western division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-rooms, at the city of Cincinnati, Ohio, in said district, on the first Tuesday of April, being also the seventh day of that month, in the year of our Lord one thousand eight hundred and ninety-six, and of the American Independence the one hundred and twenty-first—present, the Honorable George R. Sage, district judge—among the proceedings had were the following, to wit:

ELLEN R. BAKER, Complainant,
vs.
THE VILLAGE OF NORWOOD, a Municipal Corporation, Situated in Hamilton County, Ohio, Duly Organized under the Laws of the State of Ohio; John Hagerty, Auditor of Hamilton County, Ohio, and Leo Schott, Treasurer of Hamilton County, O., Respondents. } No. 4788. In Equity.

Be it remembered that heretofore, to wit, on the 24th day of January, in the year of our Lord one thousand eight hundred and ninety-five, came the complainant, by her solicitor, and filed in the clerk's office of the court aforesaid her certain bill of complaint against the defendants herein. Said bill of complaint is clothed in the words and figures following, to wit:

Bill of Complaint.

2 In the Circuit Court of the United States in and for the Southern District of Ohio, Western Division.

ELLEN R. BAKER, Complainant,
vs.
THE VILLAGE OF NORWOOD, a Municipal Corporation, Situated in Hamilton County, Ohio, Duly Organized under the Laws of the State of Ohio; John Hagerty, Auditor of Hamilton County, Ohio, and Leo Schott, Treasurer of Hamilton County, Ohio, Respondents. } No. —. Bill in Equity.

To the honorable the judges of the circuit court in and for the southern district of Ohio, western division:

And now comes the complainant herein and respectfully shows to this honorable court—

That the defendant The Village of Norwood is a municipal cor-

poration, recently incorporated under the laws of the State of Ohio as a municipal organization, located and situated in the county of Hamilton, Ohio; that John Hagerty is the auditor of said Hamilton county, Ohio, and that Leo Schott is the treasurer of said Hamilton county, Ohio.

Complainant says she is a resident of Hamilton county, Ohio, and a citizen thereof, and is the owner of real estate located in the said county and located likewise within the territorial limits of the said defendant corporation, as hereinafter shown; that she was the owner of the said real estate hereinafter described before the organization of the said municipal corporation and before its incorporation as a village; that prior to the incorporation of the said village she was the owner, as aforesaid, of real estate located at the corner of Williams avenue and Baker streets, as it was then called,
since changed to and known as Ivenhoe avenue; that prior
3 to the incorporation of the said village an avenue known as Hopkins avenue had been projected and built through the territory now included within the *territory now included within the* territorial limits of the said defendant corporation; that the said Hopkins avenue had been dedicated to public uses as a street and thoroughfare and had been improved as such by the county commissioners of Hamilton county, Ohio, lawfully authorized so to do under what was commonly known as the "two-mile assessment act."

And likewise before the incorporation of the defendant the street known as William- avenue had been opened and dedicated as a street that likewise ran through territory now included within the territorial limits of the said defendant corporation.

That complainant says that prior to the incorporation of the said village she was the owner of certain real estate abutting and fronting upon Williams avenue and extending back therefrom a distance of three hundred (300) feet; that prior to the incorporation of the said defendant there had been dedicated to the public use and for street purposes a street then known as Baker street, that runs north and south, crossing Hopkins avenue at right angles, and which said street had been so dedicated from a point south of Hopkins avenue to a point within 300 feet of Williams avenue, at which point in the said Baker street the said dedication to the public use as a street terminated.

The said Williams avenue runs east and west parallel with Hopkins avenue and south thereof; that, as aforesaid, the said Baker St. had been dedicated by property-holders from Hopkins avenue south to a point within three hundred feet of Williams avenue, where the property of this plaintiff began; that subsequent thereto and after the dedication and improvement of Hopkins avenue, the dedication of Williams avenue and of Baker street, as heretofore shown, the said defendant corporation became duly incorporated under the laws of Ohio as village, organized a village government by the election of mayor, clerk, and council, and
4 proceeded to exercise the authority and has since exercised

the authority conferred by statute in Ohio upon municipal organizations known as villages.

Complainant further says that the said defendant corporation after its incorporation proceeded to exercise the right of eminent domain, as under the statute of Ohio it had the right to do, and thereupon began proceedings in the probate court of Hamilton county, Ohio, a court of competent jurisdiction, to condemn for public use for the benefit of the public and of the said village the said strip of ground beginning 300 feet north of Williams avenue and extending southwardly to Williams avenue a distance of three hundred feet as aforesaid and fifty feet in width, the said Baker street up to that point having been theretofore fifty feet in width as dedicated, as herein shown; that the said Baker street likewise extended for some distance south of Williams avenue and through other property — had likewise been dedicated to public uses as a street and thoroughfare before the incorporation of the said defendant.

The complainant likewise says that she is the owner of real estate upon either side of the said strip of ground so undertook to be condemned by the defendant, owning 150 feet upon Williams Ave. upon the west of said strip of 300 feet and back in depth a distance of 300 feet and more, and likewise owned the property upon the east side of said strip for a distance of 150 feet and back a depth of 300 feet along and adjacent to the said strip so condemned and sought to be condemned by the said defendant; so that therefore the complainant shows that she was not only the owner of the said strip of ground, 300 feet by 50, extending northwardly from Williams avenue, which said strip the said defendant sought to condemn in order to complete and open the said Baker street and make it a through street or thoroughfare, but she likewise owned property upon either side of said strip for a distance of 300 feet and 150 feet and more upon either side of the same.

5 The complainant says that without consent upon her part and without her acquiescing or desiring so to do the said defendant village undertook by ordinance to direct the condemnation of the said strip of ground so belonging to her, and directing its solicitor to take the proper steps and proceedings in the said probate court in Hamilton county, Ohio, to condemn the same, and thereupon, upon a trial of the said cause in the said probate court, the said probate court found that the value of the said strip of ground so proposed to be condemned and taken by the defendant corporation was $2,000, and thereupon in the said condemnation proceedings the said defendant corporation was adjudged to pay to this complainant as and for the valuation of the said strip of ground so condemned and taken by the defendant corporation the sum of $2,000.

Complainant further says that prior to the commencement of the said condemnation proceedings the common council of the said defendant had changed the name of the said street or thoroughfare from Baker street, as it had been prior to the incorporation of the said defendant village and for some time thereafter and as it is

known and was known upon the county plats and records, to Ivenhoe avenue, so that the said condemnation proceedings proceeded as if for the purpose of opening and extending Ivenhoe avenue, which was in fact Baker street as originally dedicated upon the plats of the county of Hamilton by the owners, who had dedicated north and south of the strip of this plaintiff as aforesaid.

Your complainant complains of the defendant corporation that the said corporation, through its officers, its council, clerk, and mayor, undertook and *have* undertaken to assess back upon this plaintiff's 300 feet upon either side of the said strip so taken, not only the said two thousand dollars, the amount adjudged to this plaintiff as the value of her property so taken, but also counsel fees, expenses of the suit, expenses and fees of expert witnesses, and other costs, fees, and expenses to this complainant unknown, and
6 has proceeded to assess for opening and extending the said Ivenhoe street or avenue for the 300 feet upon each side upon her premises, making 600 feet in all of frontage upon the said strip so condemned by the defendant corporation, the sum of $2,218.58, payable in installments, with interest at six per cent., the first installment being $354.97 and the last or tenth installment $235.17, lessening the same from year to year in an amount of about $13 per annum.

That is to say, the said defendant corporation has undertaken to take 300 by 50 feet of this complainant's property and, fixing the valuation upon it by proceedings at law, now undertakes to assess upon the complainant's adjacent property, 300 feet upon each side, the said $2,000, the value of the same as adjudged by the court in the said condemnation proceedings, with all of the costs incidental thereto, including counsel and witness fees, so that in effect the property of this complainant has been taken and is sought to be taken by the defendant corporation for the uses of itself and the general public without any compensation in fact to the complainant therefor, but at an actual expense and outlay in addition—that is to say, the corporation purposes by assessment to make this complainant not only pay for her own property taken for the benefit of the defendant, but also to pay the costs of so taking it without compensation.

Complainant further says that by force of section 2286 of the Revised Statutes of Ohio such assessment is made the subject of a civil action, whereby the said municipal corporation may be made the plaintiff and this complainant may be made the defendant, and the said complainant may be sued in an action at law for said assessment as for money owing to the corporation, and there may be a recovery, the only limitation upon the same being that the owner of the adjacent property so sought to be assessed shall not be liable beyond her interest in the property assessed at the time of the passage of the ordinance or resolution to improve.

Complainant says that this is in violation of her constitutional rights that her property shall not be taken without full com-
7 pensation paid to her therefor; that it is in effect, under guise

of the village ordinance, taking her property, not only without compensation, but with taking the expenses to her besides.

The complainant further says and avers that she has no remedy in this matter save by injunction; that by force of statute in Ohio, where it is sought to impose upon the owner of realty an illegal assessment, the said owner is authorized to contest such imposition and assessment by injunction and not to wait and pay in said money into the treasurer and then bring an action to recover the same from the corporation as illegally assessed.

Complainant further says that the said defendant corporation, through its clerk, has certified to the defendant John Hagerty, auditor of Hamilton county, Ohio, the first installment of the assessment hereinbefore set out, and that said auditor of Hamilton county has entered the same on the tax duplicate of said county and has added a penalty thereon and undertakes to make said assessment and penalty a charge and a lien upon all the property of the complainant in Hamilton county, Ohio.

That said auditor has likewise certified said assessment and penalties to the treasurer of said Hamilton county, Ohio, and that said treasurer has caused the same to be placed upon the tax duplicate as against this complainant and has made the same a charge and a lien upon all the real estate of the complainant, and that the said treasurer threatens and is about to collect the said installment and penalties added thereto so charged up against the said property of this complainant, all without warrant or authority of law.

Wherefore she invokes her remedy given her by statute by injunction. She avers that the said seizure and taking of her said property and the pretended condemnation of the same and assessment of the same with added costs back upon her own property for the benefit of the defendant corporation and the general public is a seizure of her property without compensation, not only that, but at costs to her besides, in that the defendants have undertaken to make her pay for the taking of her property without a compensation in addition to the value of the property, and that she is without
8 remedy and powerless unless she may have and invoke the equitable interference, as the statute authorizes her, of this honorable court.

Complainant further says that the respondents have seized the said property so condemned, and that the said proceeding by assessment is simply a statutory evasion by which it is sought to evade the constitutional right of the complainant that her property shall not be taken from her without just compensation, and that under pretense and guise of the said condemnation proceedings and assessment the said corporation, in fact, took the property of complainant without paying her any compensation therefor in addition to paying the costs of said wrongful taking.

Wherefore she avers that the said assessment is illegal and unconstitutional and is in violation of the 5th amendment to the Constitution of the United States, which provides, "Nor shall private property be taken for public use without just compensation," and is in violation of section 1 of the 14th amendment to the Constitu-

tion, which provides, "Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," and is likewise in violation of section 19 of the bill of rights of the constitution of Ohio, that likewise provides that—

"Private property shall not be taken for public use, without compensation therefor made in money, without deductions for benefits to any property of the owner," and cannot and ought not to be maintained; and she prays an injunction against the defendants, who threaten, under the statutes of Ohio, to collect the same and to assess a penalty of ten per cent. for non-payment and to make the same a lien on and against her property, whereby in the event of her non-payment her said property shall and will be sold at tax sale and she deprived of the title of the same.

9 The complainant prays that the defendants may be temporarily enjoined from making such assessment, from entering the same upon their records, from assessing any penalty thereon, and from finally collecting the same, and that she may have an order of this court that such assessment is illegal and void, and a perpetual injunction forever restraining defendants from assessing against her said property within the territorial municipal corporation, in such equitable manner that she only be required to bear her proportion of the burden imposed by such condemnation proceedings, and that a subpœna may be issued for the defendants. She likewise prays for all other proper aid and relief and her costs.

C. W. BAKER,
Attorney for Complainant.

STATE OF OHIO, } ss:
Hamilton County, }

Ellen R. Baker, being first duly sworn, says that the allegations in this petition are true as she verily believes.

ELLEN R. BAKER.

Sworn to before me and subscribed in my presence this 8th day of January, A. D. 1895.

DAVID DAVIS,
[SEAL.] *Notary Public, Hamilton County, Ohio.*

Endorsed: To the clerk: Issue summons. C. W. Baker, attorney for complainant.

10 And afterwards, to wit, on the 28th day of January, A. D. 1895, the following cost bond was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Cost Bond.

Circuit Court of the United States for the Southern District of Ohio, Western Division, *ss:*

ELLEN R. BAKER, Complainant,
vs.
THE VILLAGE OF NORWOOD *et al.*, Respondents. } #4788. Cost Bond.

I hereby acknowledge myself security for costs in this case.
MICHAEL McDERMOTT. [SEAL.]

Taken and acknowledged before me this 28th day of January, 1895.

ROB'T C. GEORGI,
[SEAL.] *Deputy Clerk U. S. Circuit Court, S. D. O.*

SOUTHERN DISTRICT OF OHIO, *ss:*

I, Michael McDermott, a resident of said district, do solemnly swear that after paying my just debts and liabilities I am worth two thousand dollars in real estate within the jurisdiction of this court and subject to execution, levy, and sale.
MICHAEL McDERMOTT.

Sworn to and subscribed before me this 28th day of January, A. D. 1895.

ROB'T C. GEORGI,
[SEAL.] *Deputy Clerk U. S. Circuit Court, S. D. O.*

11 And afterwards, to wit, on the same day as aforesaid, there was issued out of the clerk's office of the court aforesaid our certain subpoena in chancery, directed to the marshal of the district and against the defendants herein. Said subpoena is clothed in the words and figures following, to wit:

Subpoena in Chancery.

UNITED STATES OF AMERICA, } *ss:*
Southern District of Ohio, }

The President of the United States of America to the marshal of the southern district of Ohio, Greeting:

You are hereby commanded to summon the Village of Norwood, a municipal corporation, situated in Hamilton county, Ohio, duly organized under the laws of the State of Ohio; John Hagerty, auditor of Hamilton Co., Ohio, and Leo Schott, treasurer of Hamilton county, Ohio, citizen- of and resident in the State of Ohio, if they be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio aforesaid, at Cincinnati, on the first Monday in April next, to answer a certain

bill in chancery filed and exhibited in said court against them by Ellen R. Baker, citizen of and resident in the State of Ohio.

Hereof you are not to fail under penalty of the law thence ensuing; and have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 28th day of January, A. D. 1895, and in the 119th year of the Independence of the United States of America.

Attest:

[SEAL.] B. R. COWEN, *Clerk.*

12 MEMORANDUM.—The said defendants are required to enter their appearance in this suit in the clerk's office of said court on or before the first Monday of March, 1895; otherwise the said bill may be taken *pro confesso.*

B. R. COWEN, *Clerk.*

Endorsed thereon: Michael McDermott acknowledges himself security for all costs for which the plaintiff may be liable in this suit.

And afterwards, to wit, on the 30th day of January, A. D. 1895, came the marshal of the district to whom the aforesaid subpoena was in form directed and returned the same into the clerk's office of the court aforesaid, with his proceedings thereon endorsed in the words and figures following, to wit:

Marshal's Return.

UNITED STATES OF AMERICA, } *ss*:
Southern District of Ohio, }

Received this writ at Cincinnati, Ohio, on the 28th day of January, A. D. 1895, and on the 29th day of January, A. D. 1895, at Cincinnati, Ohio, I served the same by handing a true copy thereof, with the endorsement thereon, personally to David Davis, mayor, and W. E. Wichgar, clerk, of the village of Norwood, Ohio, and John Hagerty, auditor of Hamilton county, Ohio, and to George Schott, deputy treasurer for Hamilton county, Ohio, in charge of the treasurer's office, who accepted the same as personal service on the treasurer, stating he had authority to do so.

4 services	8 00
4 copies	2 00
4 M. of W	24
	$10 24

HENRY BOHL,
U. S. Marshal.

13 And afterwards, to wit, on the 4th day of March, A. D. 1895, the following appearance was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Appearance of Wm. E. Bundy, Solicitor.

United States Circuit Court, Southern District of Ohio, Western Div.

ELLEN R. BAKER
vs.
THE VILLAGE OF NORWOOD *et al.* } No. 4788.

To the clerk of said court:

Please enter my appearance as solicitor and of counsel on behalf of the Village of Norwood.

WM. E. BUNDY,
Solicitors for said Respondent.

And afterwards, to wit, on the 27th day of April, A. D. 1895, the following answer was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Answer.

United States Circuit Court, Western Division, Southern District of Ohio.

ELLEN R. BAKER, Complainant,
vs.
THE VILLAGE OF NORWOOD *et al.*, Respondents. } No. 4788. Answer.

Now comes the Village of Norwood to this honorable court and for its answer to the bill in equity in this cause admits that it is a municipal corporation, located in Hamilton county, Ohio; that John Hagerty is the auditor and that Leo Schott is the treasurer of such county, and that the complainant is a resident of Hamilton county and a citizen thereof and is the owner of the real estate described, all as stated in the bill. This respondent also admits the location and dedication of Hopkins avenue, Williams avenue, and
14 Baker street, now known as Ivenhoe avenue, all as therein alleged, and that such municipal corporation was duly organized under the laws of Ohio; that it proceeded to exercise the right of eminent domain and appropriated to public use for street purposes the strip of ground 50 by 300 feet in dimensions, as described, for the opening and extension of Ivenhoe avenue, formerly Baker street, and that the complainant owned all the real estate upon either side of said strip of land which was condemned through proceedings in the probate court of Hamilton county, Ohio, and that the value of said land was fixed by the jury in said cause at $2,000. This respondent further admits that by ordinance it has levied and assessed by the front foot upon the property bounding and abutting upon such improvement all the costs and expenses incident to such appropriation, including the amount of the verdict in the probate court, and that such assessment has been divided into ten annual installments, with interest added, and that the first of such install-

ments has been certified to the county auditor; that the same has been placed upon the tax duplicate and sent to the county treasurer for collection as a lien and charge against the abutting property owned by the complainant.

This respondent denies each and every other allegation contained in the bill, and specifically denies that it has taken the complainant's property without compensation; that such assessment is made the subject of a civil action by force of section 2286 of the Revised Statutes of Ohio, and that such assessment is in violation of the complainant's constitutional rights, that it is illegal, or that it is in conflict with any section or amendment of the bill of rights of the constitution of the State of Ohio or the Constitution of the United States.

This respondent further alleges and maintains that the complainant herein received and accepted full compensation in money for her property so appropriated to public use, and that in the original ordinance to condemn the same, which was duly passed and posted according to law, the intention of the municipality to
14½ assess back upon the abutting property all the costs and expenses of such appropriation, including the values to be assessed by the jury for the property taken, was published and notice thereof was had by the complainant, and such appropriation proceedings and consequent assessment were all in strict conformity with the laws and statutes of the State of Ohio and in pursuance of due process of law. This respondent further says that the said opening and extension of Ivenhoe avenue constituted a public improvement for which the abutting property was liable to assessment under the laws of Ohio, and that the counsel fees, witness fees, and costs included in such total assessment were a part of the legitimate expenses of making such improvement.

This respondent, further answering, says that at any event an expense has been incurred by the municipal corporation in opening said street equal to the full amount of the said assessment, which is a proper charge against the complainant's abutting property.

Wherefore this respondent prays that such assessment may be sustained, or that the court may render judgment for the full amount thereof as a proper charge against the complainant's property, and that the relief asked for by her may be denied, and that her bill in equity may be dismissed at the costs of the complainant.

The Villega of Norwood, being the only one of the respondents having any real or vital interest in this action, prays that it may have all protection and relief herein that equity may require.

WM. E. BUNDY,
Solicitor of the Village of Norwood.

STATE OF OHIO, }
Hamilton County, } ss:

David Davis, being first duly sworn, says that he is the mayor of the village of Norwood, and that he believes the allegation of the foregoing answer to be true.

DAVID DAVIS, *Mayor.*

Sworn to before me and subscribed in my presence this 27th day of April, A. D. 1895.

[SEAL.] SAM'L S. CHURCH,
N. P., Ham. Co., O.

40c. due notary.

15 And afterwards, to wit, on the 28th day of April, A. D. 1895, the following replication was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Replication.

United States Circuit Court, Southern District of Ohio, Western Division.

ELLEN R. BAKER
vs.
THE VILLAGE OF NORWOOD *et al.* } Reply.

This complainant, saving and reserving to herself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendants, for replication thereunto saith that she doth and will aver, maintain, and prove her said bill to be true, certain, and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive, and insufficient in the law to be replied unto by this complainant; without that, that any other matter or thing in the said answer contained material*ly* or effectual*ly* in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all of which matters and things this complainant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by her said bill she hath already prayed.

C. W. BAKER,
Att'y for Pl't'ff.

STATE OF OHIO, } *ss:*
Hamilton County, }

On this 25th day of May before me personally appeared the above-named Ellen R. Baker and made oath that she has read the above replication subscribed by her and knows the contents thereof, and that the same is true of her own knowledge except as to the
16 matters which are therein stated to be on her information or belief, and that as to those matters she believes it to be true.

ELLEN R. BAKER.

Sworn to before me and subscribed in my presence this 25th day of May, A. D. 1895.

[SEAL.] WILLIAM R. COLLINS,
Notary Public, Hamilton County, Ohio.

And afterwards, to wit, on the 22nd day of November, A. D. 1895, the following Exhibits "A" and "B" were filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

EXHIBIT "A."

R. B. II, *pp.* 60.

COUNCIL CHAMBER,
NORWOOD, O., *Oct. 5th*, 1891.

* * * Council met in regular session, with his honor Mayor McNeill presiding.

Present at roll-call were Messrs. Guynn, Mehmert, Pape, Rolson, Thomessen.

Absent: Mr. Hess.

R. B. II, *pp.* 63.

* * * The recommendation of the board of improvements in reference to appropriation of certain private property for the purpose of opening and extending Wayland, Sherman, and Ivenhoe avenues and Linden street read and ordered received and filed. (For copy see Exhibit A.)

R. B. II, *pp.* 64.

* * * An ordinance to appropriate property for the purpose of extending Ivenhoe avenue was given its first reading and referred to the committee on law and contracts.

17 R. B. II, *pp.* 67.

COUNCIL CHAMBER,
NORWOOD, O., *Oct.* 12, 1891.

* * * Council met in adjourned session at 8 o'clock, with his honor Mayor McNeill presiding.

Present at roll-call: Messrs. Guynn, Mehmert, Pape, Rolsen, Thomessen.

Absent: Mr. Hess.

R. B. II, *pp.* 68.

* * * The committee on law and *contents* returned the ordinances referred for the purpose of opening and extending Wayland, Linden, Ivenhoe, and Sherman avenues, with recommendation for passage. On motion, ordered accepted.

R. B. II, *pp.* 68.

* * * An ordinance to appropriate property for the purpose of opening and extending Ivenhoe avenue was given its second reading.

R. B. II, *pp.* 72.

COUNCIL CHAMBER,
NORWOOD, O., *Oct.* 19, 1891.

* * * Council met in regular session at 8 o'clock p. m., with his honor Mayor McNeill presiding.

Present at roll-call: Messrs. Guynn, Hess, Mehmert, Pape, Rolsen, Thomessen.

Absent: None.

R. B. II, *pp.* 73.

* * * An ordinance, No. 285, to appropriate property for the purpose of opening and extending Ivenhoe avenue was given its third reading and passed by the following vote:

Yea—Guynn, Hess, Pape, Rolsen, Thomessen.

Nay—Mehmert.

(For copy see Exhibit B.)

18 R. B. II, *pp.* 149.

COUNCIL CHAMBER,
NORWOOD, O., *April* 4, 1892.

* * * Council met in regular session, with his honor Mayor McNeill presiding.

Present at roll-call: Messrs. Guynn, Mehmert, Pape, Rolsen, Thomessen.

Absent: Mr. Hess.

Resolution by Mr. Guynn.

* * * Resolved, That the verdicts of the jury returned respectively in causes 4886 and 4904 in the Hamilton county probate court, assessing $2,000.00 as the compensation to be paid Ellen R. Baker for the property taken for the opening of Ivenhoe avenue, and $2,775.00 as the total compensation and damages to be paid Messrs. Smith, Mills, and the C., L. & N. R'y Co. for the opening of Madison avenue, be accepted as final, and that the said respective tracts be taken and paid for by the village at said figures.

* * * Resolved further, That the engineer be directed to compute the entire cost and expenses separately in each case in conjunction with the finance committee, and to prepare the necessary assessing ordinance providing for the issuance of bonds, as provided in the appropriating ordinance heretofore passed.

* * * Adopted.

Yea—Guynn, Mehmert, Pape, Rolsen, Thomessen.

R. B. II, *pp.* 161.

COUNCIL CHAMBER,
NORWOOD, O., *May* 2, 1892.

* * * Council met in regular session, with his honor Mayor McNeill presiding.

Present at roll-call: Messrs. Guynn, Mehmert, Rolsen, Thomessen.

Absent: Hess and Pape.

19 R. B. II, *pp.* 162.

* * * Mr. Pape reports present.

* * * The committee on finance returned the resolution referred relative to the compensation for costs of appropriating property for the opening of Ivenhoe and Madison avenue-, with recommendation as follows:

Your committee on finance would recommend for passage the two ordinances covering condemnation of Madison and Ivenhoe avenue- as submitted by the engineer thereupon.

An ordinance, No. 366, to assess a special tax on real estate bounding and abutting on Ivenhoe avenue from Williams avenue to 300 feet north was given its first reading.

On motion, the rules were suspended that the ordinance may go to second, third reading and final passage this evening.

Yea—Guynn, Mehmert, Pepe, Rolsen, Thomessen.

Ordinance read second time, ordinance read third time and passed.

Yea--Guynn, Mehmert, Pape, Rolsen, Thomessen.

(For copy see Exhibit "C.")

* * * I, W. E. Wichgar, clerk of the village of Norwood, hereby certify that the foregoing is a true transcript from the minutes of the council of the village of Norwood.

W. E. WICHGAR,

[SEAL.] *Clerk of the Village of Norwood, O.*

20 EXHIBIT "A."

VILLAGE OF NORWOOD,
OFFICE BOARD OF IMPROVEMENTS.

The honorable council of the village of Norwood.

GENTLEMEN: The operations of this board have heretofore been almost wholly confined to the improvement of streets where the interest of citizens resident thereon require- prompt action and would not permit of the delays usually associated with a speculative non-resident or indifferent element. These necessities having been largely met, we deem it our duty to give immediate attention to matters affecting the general welfare of the whole village, and to supplement the work of the platting commission, as far as practicable, with such action as will produce the best results consistent with the least delay.

Any one familiar with Cincinnati cannot fail to note the constant succession of irregularity in streets produced by successive additions of acreage property, subdivided in almost every instance in utter disregard of public rights or convenience and with the sole object of yielding the greatest possible returns to speculative ventures; hence the unsightly angles, misshaped lots, needless offsets in streets that should be continuous, irregular widths, and other blemishes that stand forever as a monument to human cupidity and a curse to generations to come.

What is true of Cincinnati is true of all large cities and in less degree of villages.

In our judgment, there is no time like the present to guard against these follies and errors, which, once made, are forever made or can be corrected only at enormous cost. There is no subject which should more engage the liveliest interest of all good citizens, and to that end we invite the active co-operation of every official in every capacity in the village.

21 There are in Norwood squares of over a thousand feet in length which should be cut in two. There are streets running against new subdivisions which should be opened through. There are lanes dignified with the name of streets which should be widened and other defects to which attention will be called at the proper time.

There are platted streets already dedicated which should be opened, and we would suggest the passage of a general ordinance requiring that all fences or other obstructions upon such be removed from off the public line.

Examination of the village plat shows four streets recently platted through to which we invite attention and desire to co-operate with the platting commission in securing at once for public use. These are Wayland, Sherman, and Ivenhoe avenues and Linden street. The necessity for the acquisition of certain private property by the village to comple- these streets is briefly set forth by that commission, but, however brief, it needs no further suggestion to the most casual observer to immediately apprehend the urgent need of speedy and decisive action to secure them.

Whatever private interests may interpose are so small in comparison to the general public welfare that they need not be considered, except from a legal standpoint. As with Harris avenue, the main artery of East Norwood, now well advanced towards its permanent and proper improvements, the interests of our whole people are so involved that the insignificant personal concern of the few cannot be permitted to arrest them.

It is believed that the property in question can be secured to the village at a trifling cost, certainly cheaper now than ever again; that the organic law of the State provides simply and efficiently for this, and we would therefore urge that this entire matter be given at once into the hands of the solicitor for prompt and exhaustive examination.

Respectfully,

(Signed) H. C. MEADER.
AARON McNEILL.
WM. WINDHORST.

22 I hereby certify that the foregoing is a true copy of the report and recommendation of the board of improvements submitted to the village council Oct. 5, 1891.

[SEAL.] W. E. WICHGAR, *Clerk.*

Clerk's office, Norwood, O., Nov. 20, 1895.

23 No. 285.

An ordinance to condemn property for the purpose of opening and extending Ivenhoe avenue, from the section line to Williams avenue.

SECTION 1. Be it ordained by the counsil of the village of Norwood, two-thirds of all the members elected thereto concurring and declaring the same to be necessary, That its intention is hereby declared to condemn and appropriate to the public use for street purposes, and it hereby condemns and appropriates to such public use for the purpose of opening and extending Ivenhoe avenue (formerly Baker street) from the south line of section four (4) township three and fractional range two (2) of the Miami purchase, to Williams avenue, the property described as follows, to wit: Commencing at a point in the south line of section 4, T. 3, F. R. 2, M. P., said point being one hundred and fifty (150) feet west of the southeast corner of L. C. Hopkins's subdivision, as recorded in Plat Book No. 4, page 204, Hamilton county (Ohio) records; thence south with the east line of Ivenhoe avenue three hundred (300) feet to the north line of Williams avenue; thence west with the north line of Williams avenue fifty (50) feet; thence north parallel to the first-described line three hundred (300) feet; thence fifty (50) feet east to the place of beginning. And the solicitor is hereby authorized and instructed to institute the necessary proceedings and apply to the courts for an inquiry and assessment of the compensation to be paid for such property.

SECTION 2. The cost and expense of the condemnation and appropriation of said property, including the compensation paid to the owners thereof, the cost of proceedings, the cost of advertising, and all other costs, and the interest on bonds issued, if any, shall be assessed per front foot upon the property bounding and abutting on that part of Ivenhoe avenue, as condemned and appropriated
23½ herein, the assessments therefor to be payable in ten (10) annual installments, if deferred, and the same collected as prescribed by law and in the assessing ordinance hereafter to be passed. Bonds shall be issued in anticipation of the collection of the assessments before the same are issued, and within the time prescribed in said assessing ordinance.

SECTION 3. This ordinance shall take effect from and after the earliest period by law.

Passed October 19, 1891.

AARON McNEILL, *Mayor.*

Attest: W. E. WICHGAR, *Clerk.*

* * * I, W. E. Wichgar, clerk of the village of Norwood, hereby certify that the foregoing is a true copy of an ordinance, No. 285, passed by the council of the village of Norwood on the 19th day of October, 1891; I further certify that the same was duly published by posting true copies thereof in six (6) of the most public places in the corporation, to wit:

1 at the B. and O. S. W. R'y station, East Norwood.
1 " " " " " " —— Norwood.
1 " " C., L. & N. R'y " —— Norwood.
1 " " " " " " Hopkins avenue.
1 " " " " " Ivenhoe.
1 " " town hall, first publication having been made Nov. 3, 1891.

[SEAL.]

W. E. WICHGAR,
Clerk of the Village of Norwood.

24 No. 366.

An ordinance to assess a special tax on real estate bounding and abutting on Ivenhoe avenue, from Williams avenue to a point 300 feet north.

SECTION 1. Be it ordained by the council of the village of Norwood, Ohio, That there be levied and assessed on each front foot of the several lots of land bounding and abutting on Ivenhoe avenue, from Williams avenue, to a point three hundred feet north, the sums hereinafter named for each and every year as specified, to wit:

1892,	59.1625	cents	(59	cents,	1	mill,	0.625 mills).
1893,	56.9439	"	(56	"	9	mills,	0.439 "
1894,	54.7253	"	(54	"	7	"	0.253 "
1895,	52.5067	"	(52	"	5	"	0.067 "
1896,	50.2881	"	(50	"	2	"	0.881 "
1897,	48.0695	"	(48	"	0	"	0.695 "
1898,	45.8509	"	(45	"	8	"	0.509 "
1899,	43.6323	"	(43	"	6	"	0.323 "
1900,	41.4137	"	(41	"	4	"	0.137 "
1901,	39.1951	"	(39	"	1	"	0.951 "

To pay the cost and expense of condemning property for the extension of said Ivenhoe avenue between the points aforesaid, together with the interest on the bonds issued, to provide a fund to pay for said condemnation according to the estimate of Chas. A. Ewing, engineer for the village.

* * * SECTION 2. That the owners of the several lots of land upon each front foot of which the sums aforesaid are assessed, shall pay the amount of money by them severally due in that behalf, to the clerk of the village, on or before the thirtieth day following the day of final approval of this ordinance, in each of the said several years; and in default of such payment, the said clerk shall forthwith certify all unpaid assessments to the county auditor, to be by him placed on the tax duplicate and collected according to law.

25 SECTION 3. That to provide a fund for the payment of the cost and expense of condemning said Ivenhoe avenue, the mayor of the village and the clerk of the village be, and they are hereby, authorized to issue ten (10) bonds of the village of Norwood,

Ohio, for the sum of two hundred and twenty-one dollars and eighty-six cents ($221.86), each payable by the treasurer of the village at the Atlas National bank, Cincinnati, Ohio, in one, two, three, four, five, six, seven, eight, nine, and ten years from the thirtieth day following the day of the final approval of this ordinance, with interest thereon at the rate of six per cent. per annum, payable annually, said bonds to be signed by the aforesaid village officers, and sold by them under the direction of the finance committee of this council, for not less than their par value, and the proceeds thereof shall be applied to the payment of the cost and expenses of said condemnation, and to no other purpose whatsoever; and for the payment of said bonds, and the interest thereon, the revenue and faith and all the real and personal property of the village are hereby pledged: Provided, that if on or before the sale of said bonds any of the owners of property on said Ivenhoe avenue shall pay the whole of said ten (10) installments in cash, less the interest on said ten (10) deferred installments, the amount so paid in cash shall be applied to the payment of the amounts due, and the amount of said bonds to be issued shall be reduced by deducting the amount so paid in cash from the total amount of the fund to be provided, and the bonds issued shall be to provide a fund for the unpaid remainder, and each bond shall be for one-tenth ($\frac{1}{10}$) of such remainder, and payable with interest at the times and in the manner aforesaid.

SECTION 4. That upon the sale of said bonds the proceeds thereof shall be placed in the village treasury, and the clerk is hereby authorized and directed to draw, and the treasurer to pay, a warrant for the sum of two thousand dollars ($2,000) in favor of Ellen R. Baker, the amount certified to be due her for extending said
26 Ivenhoe avenue also another warrant for the sum of $103.58 in favor of Howard Ferris, judge of the probate court, to pay court costs in said condemnation; also to Wm. E. Bundy, $5,000 for solicitor's fee; also to W. E. Wichgar, $45.00 for expert witnesses, transcripts, fees, etc.; also to the village of Norwood $20.00 for advertising, printing, etc.

SECTION 5. That the said annual assessment, and all portions thereof, shall be paid into a sinking fund when collected, and shall be applied to the payment of said bonds and the interest thereon, as the same shall become due, and to no other purpose whatsoever.

SECTION 6. This ordinance shall take effect from and after the earliest period allowed by law.

Done at the council chamber in Norwood, Ohio, this 2nd day of May, A. D. 1892.

AARON McNEILL, *Mayor.*

Attest: W. E. WICHGAR, *Clerk.*

* * * I, W. E. Wichgar, clerk of the village of Norwood, hereby certify that the foregoing is a true copy of an ordinance, No. 366, passed by the council of the village of Norwood on the 2nd day of May, 1892. I further certify that the same was duly

published by posting true copies thereof in six (6) of the most public places in the corporation, to wit:

1 at the B. and O. S. W. R'y station, East Norwood.
1 " " " " " Norwood.
1 " C., L. and N. " " Norwood.
1 " " " " Hopkins avenue.
1 " " " " Ivenhoe.
1 " town hall, each for a period of 15 days, commencing on the 15th day of May, 1892.

W. E. WICHGAR,
[SEAL.] *Clerk of the Village of Norwood.*

27 EXHIBIT "B."

THE STATE OF OHIO, }
Hamilton County. }

Probate Court.

THE VILLAGE OF NORWOOD, Plaintiff, }
vs. } Application to Assess
ELLEN R. BAKER and WILLIAM C. BAKER, } Compensation.
Her Husband, Defendants. }

Plaintiff represents that it is a village under the laws of Ohio, and that its council, by ordinance duly passed on the nineteenth day of October, A. D. 1891, declared its intention to and did appropriate to public use for street purposes for opening and extending Ivenhoe avenue the following-described property, to wit:

Commencing at a point in the south line of section four (4), township 3 F. R., 2 M. P., said point being one hundred and fifty (150) feet west of the southeast corner of L. C. Hopkins' subdivision as recorded in Plat Book No. 4, page 204, Hamilton county, Ohio, records, thence south with the east line of Ivenhoe avenue three hundred (300) feet to the north line of Williams avenue, thence west with the north line of Williams avenue fifty (50) feet, thence north parallel to the first-described line three hundred (300) feet, thence east fifty feet (50) to the place of beginning.

The defendants own or claim to own or have some interest in or title to said property.

Wherefore plaintiff asks the court to cause a jury to be impaneled to make inquiry into and assess the compensation to be paid by the plaintiff for the property appropriated as above set forth, and that upon the payment to the owners or deposit of the amount so
28 assessed, as the court shall order, possession of said property may be awarded it according to law.

W. E. BUNDY,
Solicitor of the Village of Norwood.

THE STATE OF OHIO, }
Hamilton County, }

Probate Court.

THE VILLAGE OF NORWOOD, Plaintiff, }
vs. } Præcipe.
ELLEN R. BAKER *et al.*, Defendants, }

To the clerk:

Issue notice to the defendants named in the above application that the plaintiff will apply to the Honorable Howard Ferris, judge of the probate court of Hamilton county, on the 15th day of December, 1891, at 10 o'clock a. m., for the impaneling of a jury to make inquiry into and assess compensation to be paid by the Village of Norwood to the owners for the following property, to wit:

Commencing at a point in the south line of section four (4), T. 3, F. R. 2, M. P., said point being one hundred and fifty (150) feet west of the southeast corner of L. C. Hopkins' subdivision as recorded in Plat Book No. 4, page 204, Hamilton county, Ohio, records, thence south with the east line of Ivenhoe avenue three hundred (300) feet to the north line of Williams avenue, thence west with the north line of Williams avenue fifty (50) feet, thence north parallel to the first-described line three hundred (300) feet, thence fifty (50) feet east to the place of beginning.

W. E. BUNDY,
Solicitor of the Village of Norwood.

Filed Dec. 5, 1891.

29 STATE OF OHIO, }
Hamilton County. }

In the Probate Court.

THE VILLAGE OF NORWOOD, Plaintiff, }
vs. } # 4886. Entry.
ELLEN R. BAKER & WM. C. BAKER, Defendants. }

This cause coming on to be heard upon the application of the Village of Norwood to impanel a jury to assess the compensation to be paid to the owners of the property sought to be appropriated herein and described in the application, and it appearing to the court that notice of the time and place of such application has been given to all the owners of such property in the ordinary manner of serving legal process five days previous to said application, and that such notice is reasonably specific and certain, the court doth order and adjudge that a jury be impaneled on the seventeenth day of February, A. D. 1892, at 10 o'clock a. m., to make inquiry into and assess the compensation to be paid for said property.

HOWARD FERRIS,
Probate Judge.

Entered Jan. 21, 1892, vo. 139, page 288.

30 Hamilton Probate Court.

THE VILLAGE OF NORWOOD
vs.
ELLEN R. BAKER *et al.* } No. 4886. Verdict.

This day came the parties, by their attorneys, and also came the jury heretofore impaneled and sworn in cause No. 4904, The Village of Norwood *vs.* Edward M. Mills *et al.*, and, the parties having heretofore agreed to submit this case to said jury, thereupon said jury was duly sworn according to law and the trial proceeded.

The parties having also agreed upon the amount to be paid to defendant by the Village of Norwood, thereupon, after hearing the testimony, the court submitted the case to the jury, with instructions to brin*d* in a verdict for the amount agreed upon.

Thereupon said jury retired to their room, in charge of the sheriff, for deliberation; and now comes said jury into open court, with their verdict in writing, and say:

We, the jury impaneled and sworn in this proceeding, do find and assess compensation and damages to be paid by The Village of Norwood, plaintiff, by reason of the appropriation of said property to its use in the case submitted to us as follows:

To the owner of tract 1, as described in the petition, we assess as compensation for land taken.... ..... $2,000 00
As damages to the residue of tract.....

We make said assessment irrespective of any benefit to the owner from any improvement proposed by said corporation.

E. C. Langdon,	C. W. Muchmore,	John Todd,
George W. Victor,	Geo. Hetzler,	Abraham Lapp,
M. Mack,	E. A. Fricke,	John Lee,
John Cornish,	William Marqua,	George Schreiber.

HOWARD FERRIS,
Probate Judge.

Entered March 14, 1892, vol. 140, page 237.

31 Hamilton County Probate Court.

THE VILLAGE OF NORWOOD, Plaintiff,
vs.
ELLEN R. BAKER *et al.*, Defendants. } # 4886. Final Decree.

This cause coming on to be heard upon the application, the evidence, and the verdict of the jury heretofore rendered herein, assessing the compensation to be paid to the owner or owners of the lot or tract of land described in the application by reason of the appropriation of same to public use by the plaintiff corporation at $2,000, and the court, proceeding further to consider said cause, doth find that Ellen R. Baker is the owner of said property so taken and is entitled to receive the said amount of two thousand dollars therefor.

It is consequently adjudged that said verdict be confirmed, and

that said plaintiff corporation, upon payment within six months from the date of this entry to the owner of said tract of land of the amount of said verdict, or upon deposit of same with the clerk of this court for the use of said owner, shall be entitled to take possession of and to hold said premises for the uses and purposes of said appropriation, and upon such payment or deposit an order may issue to the sheriff of Hamilton county, Ohio, to put the plaintiff in possession of said premises, and it is considered by said court that the plaintiff pay the costs of this proceeding, taxed at $— *dollars.*

HOWARD FERRIS,
Probate Judge.

Entered Mar. 21, 1892, vo. 140, page 292.

32 Hamilton County, Ohio, Probate Court.

THE VILLAGE OF NORWOOD, Plaintiff,
vs.
ELLEN R. BAKER, Defendant. } # 4886. Entry.

It appearing to the court that the plaintiff has paid in full the sum of $2,000.00 to the defendant for the land taken, in accordance with the verdict of the jury in this cause, it is ordered that the said plaintiff shall have immediate possession and ownership of said premises for the uses and purposes of the appropriation consummated by this action.

HOWARD FERRIS,
Probate Judge.

Entered August 1, 1892, vo. 142, page 293.

33 THE STATE OF OHIO, }
Hamilton County. } *ss:*

Probate Court.

I, Howard Ferris, sole judge and *ex officio* clerk of the probate court within and for the county aforesaid, do hereby certify *that* the foregoing to be a true and correct transcript of the application to assess compensation, entry ordering impaneling of a jury, verdict of said jury, final decree authorizing payment of verdict to defendants, and of the order authorizing plaintiff to have immediate possession and ownership *In re* the Village of Norwood *vs.* Ellen R. Baker *et al.*, as the same appear from the records and files of said court.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at Cincinnati, this 15th day of November, A. D. 1895.

[SEAL.]

HOWARD FERRIS,
Probate Judge & ex Officio Clerk.

THE STATE OF OHIO, } ss:
Hamilton County, }

Probate Court.

I, Howard Ferris, sole judge of the probate court within and for said county, the same being a court of law and record, hereby certify that the signature attached to the above certificate purporting to be that of Howard Ferris is his genuine signature, and that he was at the time thereof *ex officio* clerk of said probate court, and as such full faith and credit are due all his acts, and that the attestation of said clerk is in due form of law and by the proper officer.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at Cincinnati, this 15th day of Nov., A. D. 1895.

[SEAL.] HOWARD FERRIS,
Probate Judge.

34 & 35 THE STATE OF OHIO, } ss:
Hamilton County, }

Probate Court.

I, Howard Ferris, clerk of the probate court within and for said county, the same being a court of law and record, hereby certify that the signature attached to the above certificate purporting to be that — Howard Ferris is his genuine signature, and that he was at the time thereof judge of said probate court, and as such full faith and credit are due all his official acts.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at Cincinnati, this 15th day of November, A. D. 1895.

HOWARD FERRIS,
[SEAL.] *Clerk of Probate Court.*

36 And afterwards, to wit, on the 22nd day of November, A. D. 1895, the following exhibits, C and D, were filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

"EXHIBITS C AND D."

"C."

United States Circuit Court in and for the Southern District of Ohio, Western Division.

ELLEN R. BAKER, Plaintiff, *vs.* THE VILLAGE OF NORWOOD *et al.*, Respondents.	No. 4788.	Agreed Statement of Facts.

The complainant and respondent in open court now agree to the following as a true statement of facts in this cause in addition to those that are pleaded:

1st. That the exhibits marked "A" and "B" are correct transcripts, and the same may be, and are, considered in evidence.

2nd. That at the trial of the condemnation proceedings instituted by the Village of Norwood in the probate court of Hamilton county, Ohio, to condemn for public uses the strip fifty by 300 feet the complainant in this case, who was the defendant in that case, made no objection to the exercise of that right by the Village of Norwood nor did she deny the constitutionality of the statutes of Ohio authorizing such condemnation proceedings, and such proceedings condemning said strip were in fact in conformity to the statutes of the State of Ohio.

3rd. That the said sum of $2,000.00 awarded by the verdict of the jury in the condemnation proceedings in the probate court as compensation for the strip of land 50 by 300 feet so condemned and taken by the city was paid to and received by the defendant in that action, the complainant in this, Ellen R. Baker, and it was
37 that sum, together with the costs and charges, that the Village of Norwood undertook to assess back upon the land upon either side of said strip, as truly set forth and described by the complainant's petition, the said lands being located and of the dimensions described in the petition.

4th. The only witness called at the trial of the case, the cause being submitted upon the allegations in the petition, answer, and reply and upon the agreed statement of facts herein set forth, was William C. Baker, the husband of the complainant, who testified that he had lived upon the premises in controversy for a period of twenty-four years; that his residence adjoined Ivenhoe avenue adjacent on the east to the strip 50 by 300 feet that was condemned by the Village of Norwood; that the strip 50 by 100 feet was never opened to the public travel; that it was employed as a private way or street to the complainant's property and used only for roadway to the rear of plaintiff's property, to the stable and the carriage-house, the residence of complainant fronting upon Williams avenue and the stable being in the rear, the house and stable being just east of the strip 50 by 300 feet and lying along it, a little removed from it.

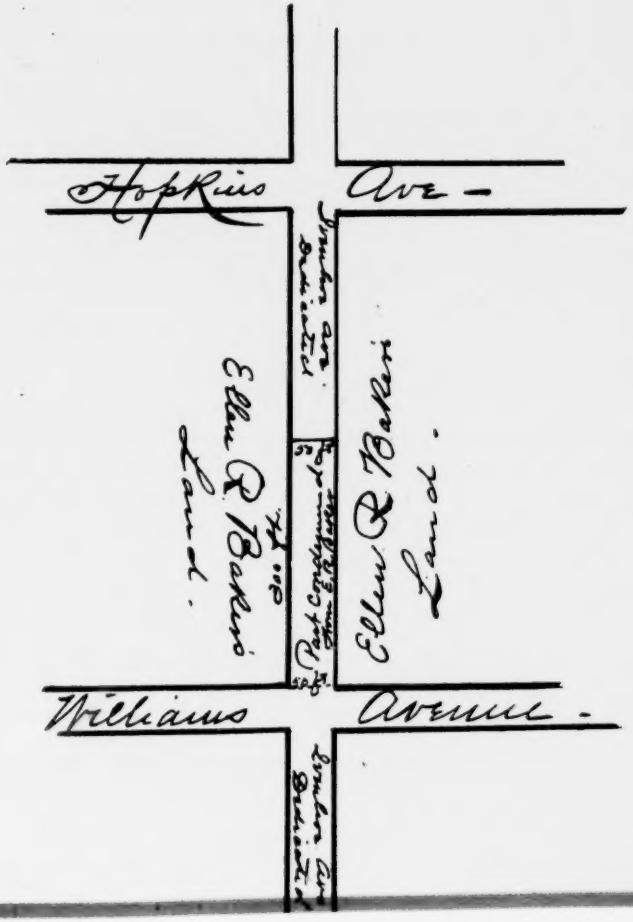
That no objection was made to anybody using it, and that it was a private driveway to the complainant's property 300 feet in length to the rear of the whole property where the stable and carriage-house was.

The plat attached is a correct plat of the tract of ground through which lay the strip of 50 by 300 feet condemned by the village of Norwood and the balance of the property of the complainant upon either side, upon which the Village of Norwood sought to assess back upon the complainant and her abutting and adjacent real estate the $2,000 aforesaid and the costs of the condemnation.

C. W. BAKER,
Att'y for Complainant.
WM. E. BUNDY,
Solicitor for Defendant.

(Here follows diagram marked p. 38.)

No. 269.
Village of Norwood } p 38
to
Ellen R Baker.



39 EXHIBIT "D."

United States Circuit Court, Western Division, Southern District.

ELLEN R. BAKER, Plaintiff,
vs.
VILLAGE OF NORWOOD *et al.*, Defendants. } No. 4788.

Charles W. Baker, counsel for plaintiff; Wm. E. Bundy, counsel for defendants.

Be it remembered that on the yearing of this cause at the October term, A. D. 1895, of the said circuit court, sitting at Cincinnati, Hamilton county, Ohio, before the Honorable George R. Sage, judge, upon the issues joined, the following evidence was introduced, to wit:

WILLIAM C. BAKER, who, being first duly sworn, testified on behalf of the plaintiff as follows:

Direct examination.

By Mr. BAKER:

Q. You are Mr. William C. Baker and live at Norwood?
A. Yes, sir.
Q. How long have you lived there?
A. Twenty-four years last July since I lived in my house there.
Q. You are the husband of Ellen R. Baker?
A. Yes, sir.
Q. She lives there also?
A. Yes, sir.
Q. Your residence adjoins Ivenhoe avenue, does it not?
A. Yes, sir.
Q. How long was Ivenhoe avenue open to public travel and used as a street by Mrs. Baker?

40 Objected to by counsel for defendants. Objection sustained; to which counsel for plaintiff excepted.

Q. How long was it open and used, Mr. Baker?
A. I cannot answer the question as you put it. It never was open to the public until Norwood claimed it to be a public street. It was a private street to our own property, used for a roadway to the rear of my property, to the stable and the carriage-house. We never objected to anybody making use of it, although it was used. Persons came through and drove over this street of mine, and there never was any objection by us to it.
Q. You had a house built there, Mr. Baker?
A. Yes, sir.
Q. Fronting on the street?
A. On the driveway, Ivenhoe——
Q. This was a private driveway to your property, 300 feet in

length to the rear of the whole lot where the stable and the carriage-house is. Ivenhoe avenue then extended up to the 300-foot strip taken on the other side and went to Montgomery pike, did it not?

The COURT: When you say it began on the other side it came around this way (indicating)?

Mr. BAKER: No, no; let me show you on a piece of paper so that your honor can see. (Diagram handed to the court.)

The COURT: I will hold this evidence open so that you can put anything in you wish.

Mr. BUNDY: We will offer a plat of the property.

(See plat attached to agreed statement of facts.)

41 And afterwards, to wit, on the 1st day of June, A. D. 1896, the following opinion was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Opinion of Judge Sage.

United States Circuit Court, Southern District of Ohio, Western Division.

ELLEN R. BAKER, Complainant,
vs.
THE VILLAGE OF NORWOOD *et al.*, Defendants. } # 4788.

The complainant's suit is to enjoin the defendants from making, enforcing, or collecting an assessment against her property amounting to $2,218.58. Her claim is that the same is in violation of her rights under the Constitution of the United States and under the constitution of Ohio. She is the owner of real estate situate in the village of Norwood, at the corner of Williams avenue and Baker street, as it was called prior to the in-orporation of said village, but since changed to and known as Ivenhoe avenue. The real estate referred to fronts upon Williams avenue, which runs east and west parallel with Hopkins avenue and south thereof. It extends back from Williams avenue a distance of three hundred feet. Baker street had been dedicated to the public use for street purposes prior to the incorporation of the village. It runs north and south, crossing Hopkins avenue at a right angle and extending beyond the same to within three hundred feet of Williams avenue, at which point it terminates, said point being on the March line of complainant's property.

After the incorporation of the village of Norwood it proceeded to exercise the right of eminent domain under the statute of Ohio, in the probate court of Hamilton county, to appropriate for the benefit of the public and of the said village a strip of ground beginning three hundred feet north of Williams avenue—that is to say,
42 on defendants' north line—thence south to Williams avenue, a distance of three hundred feet, the same being a protraction of the east line of Ivenhoe avenue to the south line of Williams

avenue; thence west with the north line of Williams avenue fifty feet; thence north parallel to the described line three hundred feet; thence fifty feet east along the north line of complainant's property to the place of beginning. Baker street for some distance south of Williams avenue and through other property had been dedicated as a street or thoroughfare before the incorporation of said defendant village. The purpose of the village was by the appropriation of the strip described to open it through complainant's premises and thereby make it a continuous street.

The complainant says that she is the owner of the real estate upon either side of said strip of ground so undertaken to be appropriated by said village—that is to say, of one hundred and fifty feet in depth upon the west and of one hundred and fifty feet in depth upon the east. In other words, the complainant sets forth that she is the sole owner of the real estate upon each side of said extension of Baker street throughout its entire length and back from the east lines of Baker street as extended one hundred and fifty feet and more.

It further appears from the bill that the value of said strip so proposed to be condemned and taken by the defendant village was by said probate court found to be $2,000, which said village was adjudged to pay complainant as and for the valuation of said strip of ground so appropriated.

The bill then sets forth that said village thereupon proceeded to assess back upon complainant's real estate upon either side of the strip condemned not only the said $2,000 adjudged to her as the value of the property taken, but also counsel fees, expenses of the suit, expenses and fees of expert witnesses, and other costs, fees, and expenses to her unknown, amounting in all to the sum of $2,218.58,
payable in ten annual installments, with interest at six per
43 cent.—that is to say, said village has undertaken to take three hundred feet by fifty feet of complainant's property, and, having fixed its valuation by proceedings at law at $2,000, now proposes to assess upon complainant's adjacent property said $2,000, with all the costs and expenses incidental thereto, whereby in fact the property of the complainant has been taken and has been sought to be taken by said village for the use of the general public not only without compensation to the complainant, but an actual expense and outlay in addition of $218.58, or which is to make the complainant not only pay for her own property taken for the benefit of the village and of the public without compensation, but also to pay the expenses of so taking it.

Complainant refers to the provision of the Revised Statutes of Ohio for relief against such assessment, and, averring that she has no remedy, save by injunction, appeals to her right under said statutes to contest the same by bill to enjoin its collection or enforcement. The auditor of the county is made defendant for the reason that, as appears from the bill, the village has certified to him the first installment of the assessment, and in accordance with the statute he has entered the same on the tax duplicate of the county, with a penalty thereon, in order to make said assessment and pen-

alty a charge and a lien upon the complainant's real estate in Hamilton county.

The bill also sets forth that the auditor has certified said assessments and penalties to the treasurer of the county, and that the treasurer has caused the same to be placed upon the tax duplicate against complainant and made the same a charge and lien upon all her real estate; is about to collect the same, with the penalties added thereto; all without warrant or authority of law. The prayer is for an injunction against all the defendants.

It was held by the supreme court of Ohio, in Caldwell *vs.* Village of Carthage, 49 O. S., 334, that where land is appropriated for a street improvement an assessment by the foot front of the
44 property bounded by and abutting upon the improvement to pay the cost thereof is not in violation of section 1 of the 14th amendment of the Constitution of the United States. There the specific objection was that no preliminary resolution declaring the necessity of the improvement, which the council of the village was required to pass and to give notice of and publish, as provided in section 2304 of the Revised Statutes, was adopted by the council, and consequently no publication was made nor was there any service of notice of such resolution. The supreme court held that the section did not apply to the condemnation of private property for opening, extending, straightening, or widening a street. It does not appear that the general question of constitutional power which is presented in this case was presented to the court in that case or was considered.

Granting, for the sake of argument, that where property is appropriated for a street the compensation to the owners and the expense of making the appropriation may be assessed upon the several owners, each bearing his proper share, quite a different question is presented when, as here, a municipality undertakes to appropriate to public use the real estate of a single owner for a public street, and then assess back upon him not only the compensation awarded for the entire street, but also all the expenses of the proceeding. If such a proceeding is not a taking for public use without compensation, I am at a loss to know what would constitute such a taking.

In Davidson *v.* New Orleans, 96 U. S., 107, Mr. Justice Bradley said: "If a State by its laws authorized private property to be taken for public use without compensation, I think it would be depriving a man of his property without due process of law." The same question was considered in Kentucky tax cases, 115 U. S., 331, and this language of Mr. Justice Bradley was quoted with approval.

Under the Ohio constitution, where private property is taken for public use compensation therefor must first be made in
45&46 money, or first secured by a deposit of money, and the compensation must be assessed by jury, without deduction for benefits to any property of the owners.

This whole subject was considered by Judge Jackson in Scott *vs.* The City of Toledo, 36 Fed. Rep., page 385. He held that such proceedings as are complained of in this bill are in violation of the provision of the 14th amendment of the Constitution of the United

States, that no State shall deprive any person of life, liberty, or property without due process of law.

The equity of this case is with the complainant, and a perpetual injunction will be decreed against the defendants, as prayed for, with costs.

GEO. R. SAGE,
U. S. District Judge.

June 1, 1896.

47 And afterwards, to wit, on the 5th day of June, A. D. 1896, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal 3, page 228.

The court finds upon the issues joined for the complainant, and that she is entitled in equity to have the relief granted her that she prays for in her bill.

The Village of Norwood is perpetually enjoined from making the assessment complained of in the said bill in equity, from entering the same upon their records, and from assessing any penalty thereon or therefrom, and from collecting the same, or from maintaining and holding the same as a lien against the complainant's property.

And the Village of Norwood is further enjoined from certifying such assessment for collection to the auditor of Hamilton county and the treasurer of said county, and the auditor of Hamilton county and the treasurer of Hamilton county are likewise perpetually enjoined from entering or maintaining upon their records any record of such assessment and from maintaining the same as a lien upon the property of the complainant described in her bill, and from collecting the same or any part thereof.

The defendant The Village of Norwood is ordered to pay the costs herein; to all of which the defendants except.

48 & 49 And afterwards, to wit, on the 21st day of October A. D. 1896, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Petition for Appeal.

United States Circuit Court, Southern District of Ohio, Western Division.

ELLEN R. BAKER, Complainant, *vs.* THE VILLAGE OF NORWOOD, a Municipal Corporation, Situated in Hamilton County, Ohio, Duly Organized under the Laws of the State of Ohio; John Hagerty, Auditor of Hamilton County, Ohio, and Leo Schott, Treasurer of Hamilton County, Ohio, Defendants.	No. 4788. Petition for Appeal.

The above-named defendant, The Village of Norwood, conceiving

itself aggrieved by the decree made and entered on the 5th day of June, A. D. 1896, in the above-entitled cause, does hereby appeal from said order and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors, which is filed herewith; and it prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court.

Dated July —, A. D. 1896.

WM. E. BUNDY,
Solicitor for the Village of Norwood.

The foregoing claim of appeal is allowed and bond for appeal fixed at $500.

GEO. R. SAGE,
U. S. District Judge, S. D. O., Sitting in and Holding the U. S. C. C. in and for the S. D. O., Western Division, in Above-entitled Cause.

50 And afterwards, to wit, on the 21st day of October, A. D. 1896, the following assignment of errors was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Assignment of Errors.

United States Circuit Court, Southern District of Ohio, Western Division.

ELLEN R. BAKER, Complainant, *vs.* THE VILLAGE OF NORWOOD, a Municipal Corporation, Situated in Hamilton County, Ohio, Duly Organized under the Laws of the State of Ohio; John Hagerty, Auditor of Hamilton County, Ohio, and Leo Schott, Treasurer of Hamilton County, Ohio, Defendants.	No. 4788. Assignment of Errors.

And now, on the — day of July, A. D. 1896, comes the Village of Norwood and says that the decree entered in this cause on the 5th day of June, A. D. 1896, is erroneous and against the just rights of said defendant for the following reasons:

First. The said decree of the circuit court for the southern district of Ohio, western division, granting the prayer of plaintiff's bill for injunction, should not have been made, but, on the contrary, the court should have found the equities of the case to be with this defendant, and the decree should have been entered dismissing the complainant's bill at her costs.

Second. The court should have found that the proceedings of the Village of Norwood were regular and in accordance with the due process of law.

Third. Said condemnation proceedings and the statutes of the State of Ohio relating to assessments therefor are not in conflict with the constitution of said State nor in contravention of
51 the bill of rights or the Constitution of the United States and do not constitute a taking of private property for public purposes without compensation.

Fourth. It appears from the record that the property of the plaintiff was duly appropriated and trial had in the probate court of Hamilton county, Ohio, as provided by law; that the plaintiff, who was defendant in that action, urged no objection therein, although the appropriating ordinance there introduced contained as one of its provisions a declaration of the intent of the corporation to assess back upon the abutting property the amount of the compensation, together with all costs and expenses of said proceeding, and that thereafter the plaintiff received and accepted the amount of compensation allowed to her by the verdict of the jury in that case. It also appears from the testimony that the property condemned had long been open for travel, but claimed as a private thoroughfare.

Fifth. Therefore, upon the whole record, it appears that the equities are with the Village of Norwood, and the court erred in entering this judgment and decree in favor of the plaintiff, when the same should have been in favor of said defendant.

Wherefore this defendant prays that said decree be reversed, and that the said circuit court may be directed to enter a decree in accordance with the prayer of the answer.

WM. E. BUNDY,
Solicitor for the Village of Norwood and of Counsel for said Defendant.

52 And afterwards, to wit, on the 29th day of October, A. D. 1896, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal 3, page 369.

Appeal bond allowed, &c.

The defendant The Village of Norwood having heretofore duly filed its petition of appeal and assignment of errors, the court doth now, upon the application of its attorney, allow the appeal herein and doth fix the appeal bond in the sum of five hundred ($500.00) dollars.

And afterwards, to wit, on the 11th day of November, A. D. 1896, the following appeal bond was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Appeal Bond.

Circuit Court of the United States, Southern District of Ohio, Western Division, *ss.*

ELLEN R. BAKER
vs.
THE VILLAGE OF NORWOOD *et al.*

Know all men by these presents that we, The Village of Norwood, as principal, and John C. Masker, as surety, are held and firmly bound unto Ellen R. Baker in the sum of five hundred dollars, to be paid to the said Ellen R. Baker, her executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

53 Sealed with our seals. Dated this 11th day of November, 1896.

Whereas the above-named The Village of Norwood has taken an appeal to the Supreme Court of the United States of America to reverse the decree rendered in the above-entitled action by the circuit court of the United States for the southern district of Ohio:

Now, therefore, the condition of this obligation is such that if the above-named Village of Norwood shall prosecute its said appeal to effect and answer all costs if it shall fail to make good its plea, then this obligation to be void; otherwise to remain in full force and virtue.

THE VILLAGE OF NORWOOD, [SEAL.]
By WM. E. BUNDY, *Solicitor.* [SEAL.]
JOHN C. MASKER. [SEAL.]

Sealed and delivered in presence of—
ROB'T C. GE*ROG*I.
SIDNEY J. COWEN.

The above security is approved.

GEO. R. SAGE,
District Judge of the United States, S. D. O., Sitting and Holding Circuit Court at the Trial of said Cause.

SOUTHERN DISTRICT OF OHIO, *ss:*

I, John C. Masker, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities I am worth twenty thousand dollars in real estate, in my own name, situate in the county of Hamilton.

JOHN C. MASKER.

Sworn to before me the 11th day of November, 1896.
[SEAL.] ROB'T C. GEORGI,
Deputy Clerk U. S. Circuit Court, S. D. O.

53½ THE UNITED STATES OF AMERICA, *88:*

To Ellen R. Baker, Greeting:

Whereas The Village of Norwood has lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the southern district of Ohio, made in favor of you, the said Ellen R. Baker, and has filed the security required by law, you are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the tenth day of December, A. D. 1896, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Cincinnati, in the sixth circuit, this 11th day of November, in the year of our Lord one thousand eight hundred and ninety-six.

GEO. R. SAGE,
District Judge of the United States of America,
Southern District of Ohio, Sitting and Holding
Circuit Court at the Trial of said Cause.

53¾ [Endorsed:] Marshal's civil docket No. 113. United States circuit court, S. D. O., W. D. No. 4788. Ellen R. Baker *vs.* The Village of Norwood *et al.* Citation to appellee. Filed Nov. 20, 1896. B. R. Cowen, clerk.

UNITED STATES OF AMERICA, }
Southern District of Ohio. }

Received this writ at Cincinnati, Ohio, on the 19th day of November, 1896, and on the 20th day of November, 1896, I executed the same on the within-named Ellen R. Baker by leaving a true copy hereof, with all the endorsements thereon, at her usual place of residence, at Norwood, Ohio, and I left said copy in the hands of an adult member of her family.

MICHAEL DEVANNEY,
U. S. Marshal, S. D. O.,
By JOHN W. DEVANNEY, *Deputy.*

Service	2 00
Copy	50
7 mi	42
Return	30
	3 22

54 THE UNITED STATES OF AMERICA, }
Southern District of Ohio, Western Division, } *88:*

I, Benjamin R. Cowen, clerk of the circuit court of the United States of America within and for the division and district aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the above-entitled cause and as the same appears of record and on file in the clerk's office of said court.

Seal of the Circuit Court, South'n Dist. of Ohio.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Cincinnati, Ohio, this 21st day of November, A. D. 1896.

B. R. COWEN, *Clerk*,
By JANIE W. F. COWEN,
Deputy Clerk.

Endorsed on cover: Case No. 16,444. S. Ohio C. C. U. S. Term No., 269. The Village of Norwood, appellant, *vs.* Ellen R. Baker. Filed December 7, 1896.

SUPREME COURT OF THE UNITED STATES.

THE VILLAGE OF NORWOOD,
Appellant,

vs.

ELLEN R. BAKER.

No. 269.
Appeal from the Circuit Court of the United States, for the Southern District of Ohio.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This case was commenced in the Circuit Court of the United States for the Southern District of Ohio. It comes to the Supreme Court upon appeal from a decree below enjoining the collection of a special assessment levied upon the property of Ellen R. Baker for the purpose of paying the costs and expenses of condemnation for the opening and extension of a public highway through her lands.

The opinion of Judge Sage filed in the Circuit Court is printed on pages 26, 27 and 28 of the record.

The Village of Norwood, a municipal corporation duly organized under the laws of Ohio, and situated in a county containing a city of the first grade of the first class, by regular and complete proceedings under the statutory laws of Ohio, condemned and appropriated to the public use a certain strip through the lands of the complainant, fifty feet wide and three hundred feet long, for the opening and extension of Ivanhoe Avenue, previously known as Baker Street; and assessed the costs and expenses of said appropriation, duly consummated by proceedings in the Probate Court of Hamilton County, Ohio, upon other lands of the complainant bounding and abutting upon both sides of that part of the street or avenue so appropriated. The proceedings were originated in the Board of Improvements, as required by the municipal code of Ohio, and by said board recommended to Council. (See pages 14 and 15 of the printed record.) The original ordinance to condemn, No. 285, was passed October 19, 1891, and in Section 1 thereof declared the intention to condemn and actually appropriated the property described, and authorized the solicitor to apply to the courts for an inquiry and assessment of the compensation to be paid. Section 2 of said ordinance provided that "the cost and expense of the condemnation and appropriation of said property, including the compensation paid to the owners thereof, the cost of proceedings, the cost of advertising and all other costs, and the interest on bonds issued, if any, shall be assessed per front foot upon the property bounding and abutting on that part of Ivanhoe Avenue as condemned and appropriated herein, the assessments therefor to be payable in ten annual installments, if deferred, and the same collected as prescribed by law and in the assessing ordinance hereafter to be passed," and for the issuance of bonds. This is in conformity to

the requirements of Section 2264 R. S., which directs, among other things, that the lots and lands to be assessed should be determined by ordinance before the improvement is made. The items included in said ordinance and in the assessment thereafter levied are authorized by Section 2284 of the Revised Statutes of Ohio. This ordinance was duly posted (one copy at Ivanhoe) in six of the most public places in the corporation, the first publication having been made November 3, 1891. (Pages 16 and 17 of the printed record.) Upon the 5th day of December, 1891, pursuant to the provisions of said ordinance, an application to assess compensation was filed in the Probate Court of Hamilton County, Ohio, a court of competent jurisdiction under the laws of said state in such cases, in which the said property was fully described, and a notice was issued to the defendants, which notice also included a description of the property sought to be taken, and served upon them, including Ellen R. Baker, according to law. Upon the 14th day of March, 1892, the parties appeared voluntarily by their attorneys and submitted the case to a jury, having agreed upon the amount of the verdict to be returned, to wit, $2,000.00; and thereafter the court entered its final order or decree, and the amount of compensation was then paid in full for the land taken. (Pages 19, 20, 21 and 22 of the printed record.) The complainant, Ellen R. Baker (having notice by the publication of the ordinance to condemn and coming into the Probate Court thereunder), made no objection to the right of the village to proceed with the suit, nor did she deny the constitutionality of the Statutes of Ohio at that time, and the proceedings of the village were, in fact, in conformity thereto. She received and accepted the $2,000.00 awarded by the jury. (See agreed state-

ment, page 24 of the record.) It does not appear that at any time she, or anyone for her, ever protested, or even notified any of the village authorities of her dissatisfaction with the manner of assessment provided for in the original appropriating ordinance, upon which all subsequent proceedings were founded, until the filing of her bill in equity in this case. In fact, in our judgment, her conduct indicated acquiescence, and the municipality was suffered and encouraged to issue and sell bonds thereby to raise the funds with which to pay the costs and expenses of said appropriation, including her own compensation, which bonds the corporation has made no provision to pay except by the assessing ordinance, No. 366, passed May 2, 1892 (page 17 of the record), and it will have no funds out of which said bonds can be legally paid if the Circuit Court is sustained and said assessment is finally enjoined in this action. The testimony of William C. Baker (Record, page 25) discloses that this strip of ground so condemned was considered as a private street, but that it was used by the public without objection before any proceedings were taken to appropriate the same, and that a house had been built by him fronting thereon (on the driveway, as he called it). The complainant claimed her right to sue by injunction in the Federal court by virtue of Section 5848 of the Revised Statutes of Ohio.

ASSIGNMENT OF ERRORS.

The Village of Norwood assigns for error that the Circuit Court held the equities to be with the complainant, Ellen R. Baker, and enjoined the assessment on the ground that it was in conflict with the Constitution of the United

States; also that said Circuit Court refused to dismiss the bill of complaint, as required by the law and doctrine of estoppel. (See pages 30 and 31 of the record.)

THE COMPLAINT.

The complainant says (pages 5 and 6 of the record):

First—That said assessment is illegal and unconstitutional, and is in violation of the 5th Amendment of the Constitution of the United States, which provides "nor shall private property be taken for public use without just compensation."

Second—That it is in contravention of Section 1 of the 14th Amendment, which provides "nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Third—That said assessment is in violation of Section 19 of the Bill of Rights of the Constitution of Ohio, providing that "private property shall not be taken for public use without compensation therefor made in money, without deductions for benefits to any property of the owner."

We shall now discuss these propositions in their order. If this court believes them to be unsound it will then be unnecessary to consider the questions of estoppel argued in the closing pages of this brief, which counsel believe to be, in any event, a good defense.

ARGUMENT.

I.

We believe it to be well settled that the restrictions of the 5th Amendment to the Constitution of the United States do not have reference to the exercise of the right of

eminent domain by municipal corporations operating under charters from, and governed by the laws of one of the several states. That provision is intended solely as a limitation on the Federal Government and not on the authority of the states.

Barron v. Baltimore, 7 Pet. 243 (8:672).
Withers v. Buckley, 20 Howard, 84 (15:816).

II.

Has the complainant been deprived of her property "without due process of law"? Are the laws of Ohio relating to such assessments in contravention of Section 1 of the 14th Amendment? These enactments are found in Title XII (Municipal Code), Chapter IV, of the Revised Statutes of Ohio. Section 2263 provides that "when the corporation appropriates, or otherwise acquires, lots or lands for the purpose of laying off, opening, extending, straightening or widening a street, alley or other public highway, or is possessed of property which it desires to improve for street purposes, the Council *may* assess the costs and expenses of such appropriation or acquisition, and of the improvement, or of either, or of any part of either, upon the general tax list, in which case the same shall be assessed upon all the taxable real and personal property in the corporation."

Section 2264 provides that in the cases mentioned in Section 2263, "and in all cases where an improvement of any kind is made, . . . the Council *may decline* to assess the costs and expenses in the last section mentioned (2263), or any part thereof, or the costs and expenses of any part thereof of such improvement . . . on the general tax list, in which event such costs and expenses, or any part thereof which may not be so assessed on the

general tax list, shall be assessed by the Council on the abutting, and such adjacent and contiguous, or other benefited lots and lands in the corporation, either in proportion to the benefit which may result from the improvement, or according to the value of the property assessed, or by the foot front of the property bounding and abutting upon the improvement, as the Council by ordinance, setting forth specifically the lots and lands to be assessed, may determine before the improvement is made, and in the manner and subject to the restriction herein contained."

Section 2271 limits any such special assessment to 25 percent of the value of the land assessed, for all villages in the same class with Norwood, stipulates that the cost exceeding that percentum shall be paid by the corporation out of its general revenue, and provides that "whenever any street or avenue is opened, extended, straightened or widened the special assessment for the cost and expense, or any part thereof, shall be assessed *only on the lots and lands bounding and abutting on such part of such street or avenue so improved*, and that said special assessment shall not be, in any case, in excess of benefits."

In the case at bar complainant does not claim, nor has she ever claimed, that the assessment exceeds the benefits, nor is there any evidence tending to prove this as a fact. On the contrary, the testimony tends to show a benefit, although that question is not really brought in issue herein, except collaterally.

The Council of Norwood proceeded according to the plain directions of the statute and levied the assessment in the only permissible way thereunder. If the assessment exceeded 25 percent of the value of the property upon which it was levied after the improvement was made (street opened), or if it was in excess of benefits, the complainant

had a plain remedy by injunction, pursuant to the provisions of Section 5848 of the Revised Statutes of Ohio, which reads as follows: "Courts of Common Pleas and Superior Courts shall have jurisdiction to enjoin the illegal levy of taxes and assessments, or the collection of either, and of actions to recover back such taxes and assessments as have been collected, without regard to the amount thereof, but no recovery shall be had unless the action be brought within one year after the taxes or assessments are collected."

The complainant had the right to go into court with a petition alleging that the assessment charged against her was in excess of benefits derived from the street as opened and extended through her property, or even that she obtained no benefits whatever by reason of said improvement, and in this way, upon hearing, the assessment might either be reduced to the proper charge, as contemplated by Section 2289 of the Statutes of Ohio, or enjoined in its entirety, as the proof should warrant. In the case of Longworth v. The City of Cincinnati, reported in the 23d Weekly Law Bulletin, page 104, Judge Taft, then upon the Superior Bench, and now one of the Judges of the U. S. Circuit Court of Appeals, said: "I think that the learned Judge (referring to Judge Jackson in the Toledo case, found in the 36th Federal Reporter) overlooked the statutory provision under which this suit is brought, which enables every taxpayer to bring an action for an injunction against the collection of any tax or assessment which he claims to be illegal or unjust, without any allegation of inadequacy of legal remedy required by the rules of equitable procedure to justify relief by injunction. In this way the taxpayer can have his day in court." Judge Jackson, after his decision in the Toledo case, sustained a similar assessment to

the one herein contested in the case of Murdock v. The City of Cincinnati, reported in the 25th W. L. B., page 26, and again referred to in this brief.

It is well settled in Ohio that the statutory regulations for such condemnations and assessments as the one at bar and their observance secure to the property-owner and the taxpayer "due process of law."

Cleveland v. Wick, 18 O. S. page 303.
Krumberg v. Cincinnati, 29 O. S. page 69.
Caldwell v. The Village of Carthage, 49 O. S. page 334.

In the last named case, decided April 26, 1892, the Supreme Court say in the syllabus: "Where land is appropriated for a street improvement an assessment by the front foot of the property bounding and abutting upon the improvement to pay the costs thereof, without the passage, notice and publication of (such) preliminary resolution, as thus provided, will not thereby be a taking of property without due process of law in violation of Section 1 of the 14th Amendment of the Constitution of the United States."

In the statement of facts in that case, on page 335, it appears that the Village of Carthage, in order to widen Taylor Street, appropriated a strip of ground belonging to the plaintiff 33 feet wide, being the west side of Taylor Street for its entire length. To pay the costs and expenses of the appropriation a special assessment was levied by the foot front upon the lots and lands of the plaintiff bounding and abutting upon the improvement. In other words, a part of the lands of the plaintiff were taken and an assessment, for the amount of compensation allowed and other costs and expenses, was levied upon the remainder, exactly the same as in this case. There is not even any complaint

in the case at bar as to failure to pass a preliminary resolution or serve notice.

We quote the following from the opinion in Caldwell v. Carthage, *supra*, pages 348, 349, 350, which met with the unanimous concurrence of the judges of the Supreme Court of Ohio:

"Due process of law implies a due course of legal proceedings according to those rules and forms which have been established for the protection of private rights. If the validity of an assessment is called in question, an opportunity must have been given to resist it, either by allowing a hearing before the imposition thereof, or by providing for an appeal to a court of law afterwards. But as said in McMillan v. Anderson, 95 U. S. 37, it is not, and never has been, considered necessary to the validity of a tax that the party charged should have been present, or had an opportunity to be present, in some tribunal when he was assessed. In that case it was held that a statute which gives a person against whom taxes are assessed a right to enjoin their collection and have their validity judicially determined is due process of law, notwithstanding he is required, as in other injunction cases, to give security in advance. In Davidson v. New Orleans, 96 U. S. 97, it was said by Mr. Justice Miller: 'Whenever by the laws of a state, or by state authority, a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice with such notice to the person, or such proceeding in regard to the property, as is appropriate to the nature of the case, the judgment in such proceedings can not be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections. . . . It

is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the state, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case.' These principles have been reaffirmed in the opinion of Mr. Chief Justice Fuller, in Walston v. Nevin, 128 U. S. 578.

"The inquiry is suggested, What is the remedy by which, in Ohio, the property-owner may test the illegality of an assessment? By Section 5848 of the Revised Statutes 'Courts of Common Pleas and Superior Courts shall have jurisdiction to enjoin the illegal levy of taxes and assessments.' An opportunity is here afforded to establish the invalidity of the tax or assessment; and with such privilege, if judgment is rendered against the property-owner in the suit, it can not be properly said that his rights of property have been determined without due process of law or judicial investigation. Tone v. Columbus, 39 Ohio St. 301, 302; Stephan v. Daniels, 27 Ohio St. 536; Steese v. Oviatt, 24 Ohio St. 253. Between the passage of the condemnation and assessment ordinances and an advertisement of a tax sale ample time elapses, and ample notice of the proceedings to appropriate and assess is provided for, to enable the owner to go into court and contest the assessment by application for injunction.

"If the special assessments are not paid by the time stipulated in the ordinance providing for the same, they may be recovered by suit, or the lien therefor may be enforced in the name of the corporation against the property-owners. Revised Statutes, Secs. 2285, 2286, 2294. And in a suit to recover the assessment or to enforce the lien therefor the owner of the property assessed may set up in defense the illegality of the assessment. In Murdock v. Cincinnati, 25 Weekly Law Bulletin, 26, U. S. Circuit Court, S. D. O., it was said by Jackson, J.: 'It appears that the City of Cincinnati is now proceeding, by civil suit in the state courts against complainant, to collect the assessment in

question. To that suit complainant may interpose any and all defenses going either to the validity or regularity of such assessments. Such suit gives him a full opportunity to be heard and affords him the privilege of presenting every objection that can possibly be made, either under the Constitution of the United States, or under the Constitution and laws of Ohio, to the validity of the assessment. It can not be questioned that the judgment which may be rendered against complainant in said suit will constitute "due process of law." If the owner of assessed property may have the benefit of the law of the land or due process of law, in a suit against him by the corporation making the assessment, he may also have the benefit in a suit by himself against the corporation wherein the same questions can be determined.'"

If the complainant is afforded "due process of law" by the statutes and courts of Ohio, the provisions of the 14th Amendment are complied with by the state, and its instrumentality, the incorporated Village of Norwood.

This court has recently reviewed some of the principles concerned in the case at bar in three well-considered opinions, to wit:

Fallbrook Irrigation District v. Bradley, 164 U. S. 112.

The C. B. & Q. Ry. v. Chicago, 166 U. S. 226.

And especially

Bauman v. Ross, 167 U. S. 548.

The principle is asserted in this latter case, supported by many authorities, both State and Federal, which are comprehensibly reviewed, that, under the legislative power of taxation, an assessment may be levied upon a remainder of a tract after the condemnation of a part, on the principle of benefits derived by the owner from the existence of a

new street. This case turned upon the construction and constitutionality of an act of Congress providing for the condemnation of property for streets and highways within the District of Columbia. Section 11 of that act provides that "where the use of a part only of any parcel or tract of land shall be condemned, in such proceedings the jury in assessing damages therefor shall take into consideration the benefit that the purpose for which it is taken may be to the owner or owners of such tract or parcel by enhancing the value of the remainder of the same, and shall give their verdict accordingly, and the court may require in such case that the damages and the benefits shall be found and stated separately." Section 15 of that act provides for assessing and charging the amount awarded as damages one half upon the lands benefited and the other half upon the District of Columbia, and that the same jury which shall assess the damages caused by the opening of any highways or reservations, or part thereof, shall ascertain and determine what property is thereby benefited, and shall assess against each parcel which it shall find to be so benefited its proper proportional part of the damages. In this case this court quotes with approval Chief Justice Cranch in Chesapeake & Ohio Canal v. Key (1829), 3 Cranch C. C. 591, 601. "The benefits to be derived therefore may as well set off against the value of the land as against the damages, and we see no reason why the jury may not find the result in one entire sum." See Chesapeake & Ohio Canal v. The Union Bank of Georgetown (1830), 4 Cranch C. C. 75, 80. The same principle was followed by Chief Justice Waite, speaking for the Supreme Court in 1881, saying that the construction of a canal might confer benefits that would be a just compensation for the private property taken for its use. This court says, in Bauman v. Ross,

on page 574, consequently, when a part only of a parcel of land is taken for a highway the value of that part is not the sole measure of the compensation or damages to be paid to the owner, but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account; when, on the other hand, the part which he retains is especially and directly increased in value by the public improvement, the damages to the whole parcel by the appropriation of a part of it are lessened. If for example, by the widening of a street the part which lies next the street, being the most valuable part of the land, is taken for the public use, and what was before in the rear becomes the front part and upon a wider street, and thereby of greater value than the whole was before, it is neither just in itself nor required by the constitution that the owner should be entitled both to receive the full value of the part taken and considered as front land, and to retain the increase of value in the back land which has been made front land and by the same taking.

The court finds that there is nothing in the act of Congress inconsistent with the Constitution. In the case at bar the complainant does not say that the assessment, otherwise levied in accordance with the Ohio Statute, is in excess of benefits.

There is no distinction in principle between a jury setting off benefits against damages or values, as contemplated by the act of Congress found to be valid in the case of Bauman v. Ross, and in allowing pay for the property taken without deduction for benefits and then levying an assessment to pay the cost and expense of such appropria-

tion in a sum not in excess of benefits conferred by the improvement. It is only a difference in method of procedure as provided by legislation. The complainant herein has never sought or pursued the plain remedy provided by the Statutes of Ohio, and it can not be said therefore that there has been any *action of the state courts* as to this assessment inconsistent with the 14th Amendment to the Constitution. The procedure and process of the Ohio statutory laws are adequate, but their protection has not been invoked. Compensation has been made and paid for the property taken from Ellen R. Baker for the public use and she has accepted the money with full knowledge of the fact that an assessment was to be placed upon her remaining property. If, by reason of the said improvement or opening of Ivanhoe Avenue, her other property has been benefited or increased in value to an amount equal to that assessment, she has been justly compensated, nothing has been taken away from her, and she is as well off as she ever was, and this question can be tried under the laws of the State of Ohio.

This is an assessment levied by the front foot and there has been no adjudication by the Council of the municipality as to benefits or values, and as to such condemnation assessments Council has no power to determine these questions. It is the province of the courts to do so, and cases under Section 5848 are frequent in Ohio.

In the case of the C. B. & Q. Ry. Co. v. Chicago, decided by this court during the October term of 1896, and reported in the 166th U. S., pages 226–259, this court says in the syllabus: "In a proceeding in a state court for the condemnation of private property for public use, the court having jurisdiction of the subject-matter and of the parties,

the judgment ought not to be held in violation of the due process of law enjoined by the 14th Amendment unless some rule of law was prescribed for the jury that was in absolute disregard of the right to just compensation;" and

in the opinion, Mr. Justice Harlan fully reviews some of the principles applicable to the questions here at issue. In that case only a nominal verdict was returned by the jury and under the state of facts presented in the record and discussed in the opinion, there being some mutual or reciprocal obligations between the city and the railroad company, the verdict of the jury was sustained and the judgment rendered thereupon affirmed.

In the case of the Fallbrook Irrigation District v. Bradley, 164 U. S. 113, this court affirms, in the syllabus, the doctrine in Davidson v. New Orleans, 96 U. S. 97, 104, that

"Whenever, by the laws of a state, or by state authority, a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming *or contesting* the charge thus imposed in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings can not be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

Also (from the syllabus in F. I. D. v. B.), "process of law is furnished, and equal protection of the law given in such proceedings when the course pursued for an assessment and collection of taxes is that customarily followed in the state, and when the party who may be charged in his property has an opportunity to be heard."

In the case of Spencer v. Merchant, 125 U. S. 345, the Supreme Court said:

"If the legislature provides for notice to and hearing of each proprietor at some stage of the proceedings upon the question of what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law."

In Pearson v. Yewdall, 95 U. S. 294, this court laid down the definition of "due process" to be that where ample provision is made in a State act for an inquiry as to damages before a competent court, and for a review of the proceedings of the court of original jurisdiction, upon appeal to the highest court of the State, this is due process of law within the meaning of that term as used in the Federal Constitution.

The complainant herein may apply, through the process of the laws of her state for an adjudication or ascertainment of the benefits to her remaining lands derived by her from the improvement, to wit: the opening and extension of Ivanhoe Avenue. If, upon hearing, the Ohio courts find that her benefits are equal in value to, or in excess of, the amount of the assessment, she has not been deprived of her property without compensation.

As to "compensation," this court says, in Bauman v. Ross, on page 574:

"The right of eminent domain, as was said by this court, speaking through the Chief Justice, in a recent case, is an offspring of political necessity and is inseparable from sovereignty unless denied to it by its fundamental law. It can not be exercised, except upon the condition that just compensation shall be made to the owner; and it is the duty of the state, in the conduct of the inquest upon which the compensation is ascertained, to see that it is just, not

merely to the individual whose property is taken, but to the public which is to pay for it."

In Searl v. Lake Co. School District, 133 U. S. 553, 562, appears this language:

"The just compensation required by the Constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of and no more. To award him less would be unjust to him; to award him more would be unjust to the public."

See also the argument of Judge Welch, speaking for the Supreme Court of Ohio, in City of Cleveland v. Wick, 18 Ohio State, 307, reprinted in the following pages of this brief.

Nearly all other streets have been voluntarily dedicated by the owners. The plat shows other streets to be open and remainder of Ivanhoe Avenue to have been dedicated.

It is manifestly unjust that Mrs. Baker should compel her neighbors who have given their land to the public to also pay for her street in front of her own premises, at least until she shows in the manner provided by law therefor that such street is of no benefit to her other lands, or that the assessment exceeds the benefits. It is possible that one person may own all or nearly all the real estate within the municipal corporation, and if the principle advocated by the complainant should be carried to the extreme, the burden of taxation occasioned by the appropriation of private property for public purposes might be borne by four or five poor men for the benefit of one rich one, or the right of eminent domain would be a nullity. It is immaterial whether there be only one or fifty affected by the condemnation proceedings and the assessment; the Ohio laws

afford ample protection against "confiscation," for no assessment can be sustained in excess of benefits, or for more than 25 percent of the value of the property assessed.

The village should not be required to pay Ellen R. Baker twice, both in money and by causing a benefit or increase in the value of her remaining property, especially at the expense of others who had already given or dedicated the land for the street in front of their respective premises.

III.

Does said assessment conflict with Section 19 of the Bill of Rights of the Ohio Constitution? What is the duty of this court, with respect to this question? This is defined in the syllabus in the case of The Fallbrook Irrigation District v. Bradley, 164 U. S. 113, to be as follows:

"It is the duty of the Federal courts, in exercising jurisdiction as to questions arising under the state constitution, to be guided by and to follow the decisions of the highest court of the state, as to the construction of the statute, and as to whether, if so construed, it violates any provision of that constitution."

The Supreme Court of Ohio has spoken as to a similar assessment in the leading case, never modified nor reversed, of Cleveland v. Wick, 18 O. S. page 304. The syllabus is as follows: "An assessment upon lands fronting on a street to reimburse the amount of compensation paid the owner for his other land taken for the use of the street is authorized by the statute and is not in violation of the constitutional provision which guarantees to owners of land so taken a full compensation without deduction for benefits."

In discussing this section of the Ohio Constitution, Judge

Welch, speaking for the court in the Wick case, beginning on page 307, presents most excellent and logical reasons in support of such assessments from both a legal and equitable standpoint, as follows:

"If this tax was authorized by law, as soon as assessed it became a debt, and the mere delay to place it upon the duplicate, or to use other means for its collection, did not extinguish the debt. Counsel do not, perhaps, mean seriously to dispute this proposition. But they contend, with great earnestness and much ability, that the tax is not authorized by law. Is this latter position maintainable?

"It is not denied that the tax was assessed in conformity to the statute. But it is said that this statute is contrary to the Constitution, in so far, at least, as it imposes upon a party any assessment to reimburse the compensation paid for his own land. It thus does indirectly, it is said, what can not be done directly. It pays a price for the land and then takes it back. It accords the owner of land taken full compensation, 'without deduction for benefits,' but it immediately assesses him an equal amount for the same benefits. Thus, it is argued, the constitutional provision which guarantees to the owner of land taken a full compensation, 'without deduction for benefits,' is evaded or nullified because the same result is reached, whether the value of the benefits is deducted in the first instance, or is afterward reclaimed in the shape of an assessment; the only difference to the land-owner being the difference between two words, 'Assessment' and 'deduction.'

"But there are two provisions of the Constitution to be considered in connection with the question raised. One gives this power of condemnation with the restriction that it shall be exercised only upon payment of a full compensation. The other gives the power of taxation by 'assessment.' No matter if the latter power is given by mere implication (Art. 13, Sec. 6), or is only to be found in a general grant of legislative power, it is none the less cer-

tainly given, and is none the less sacredly to be maintained. Nothing is better settled under the provisions of the new Constitution than the existence of this power of local assessment. Hill v. Higdon, 5 Ohio St. 243; Reeves v. Treasurer, 8 *Ib.* 333; Zanesville v. Richards, 5 *Ib.* 589. It is a distinct and separate power, wholly independent of the provision as to condemnation of land for public uses, or the price which shall be paid the owner. If practicable we must so construe the Constitution as to leave both these provisions—that which guarantees a full compensation without deduction for benefits and that which gives the power of local taxation—standing in full force, each unintrenched upon by the other.

"It is not denied that at the time of the adoption of the present Constitution this power of local assessment existed to the extent claimed here. See 18 Ohio, 518; 1 Ohio St. 127. If it does not exist to the same extent now it is because it is limited by the provision in regard to compensation. The argument seems to be that it is so far limited by that provision as to deny the right to assess a party for that part of the cost of an improvement which consists of the price of his own land. But if the argument is good to that extent it is good for much more, and would, if carried to its legitimate result, practically defeat the whole power of local assessments. It would be impracticable to discriminate in making such assessments between the expenditure incurred in paying for the party's own land and the cost of other lands, or between the expenditure for his land and any other expenses of the improvement. And if it were practicable it would be manifestly unjust to the owners of other lands subject to assessment.

"Suppose a new street to be laid through the lands of A and B, taking an acre from each. Neither, it is said, can be taxed to pay for his own acre, but each can be taxed to pay for the acre of the other. What is the difference whether each is taxed for half the cost of two acres or for the whole of the cost of one acre. If there were ten pro-

prietors instead of two, the difference would be between one tenth of ten and one tenth of nine. If one of the ten happened unfortunately to abut on the street, so that none of his land was taken, he would have to pay for all the land taken from the nine, although they got full prices for their land 'irrespective of benefits' which they enjoy in common with him. One party might own nearly all the land benefited by the improvement, and yet, because a square rod of his land is taken and fully paid for, he goes scot-free, enjoying most of the benefits, and the whole burden falls upon the others. It is easy to see that no construction leading to such results can be admitted, and that if you deny the power to assess a party to pay for his own land you logically and necessarily deny the power to make any assessment for land taken.

"But the argument goes still further, and is, in effect, that you can not assess a party whose land is taken for any part of the cost of the improvement, whether for the price of land or for other expenses. The assessment, it is contended, is a kind of offset or equivalent for the benefit rendered by the improvement—a mode of deduction for benefits—and therefore you are forbidden to levy any assessment for the improvement against a party whose land has been taken. The Constitution guarantees him two things: (1) a full price for his land, and (2) that he shall be charged nothing for benefits. What benefits? The benefits from the whole improvement. The benefits are to him a unit, and you can no more assess him for one part of the expense than for another. If you assess him for the improvement, for any part of the expense, you assess him for the benefits. Counsel say that to 'assess' him for the benefits is the same as to 'deduct' them. As to him, 'deduction' and 'assessment' are convertible terms. Their reading of the provision in question is that a party whose land is taken for public use shall be paid a full compensation therefor without 'assessment for benefits.'

"If the argument is good for anything, it proves that no

assessment can be made, for any public improvement, against parties whose lands have been condemned for its use, and practically the whole power of local assessment is defeated by this provision.

"What was the object of the provision in question? What was the evil intended to be remedied by it? Surely it was no part of its object to remedy any supposed inequality or abuse of the power of local taxation. No such evil was complained of. The mischief which existed under the old Constitution was that the benefits which were common to his neighbors without charge were deducted from the price paid to the owner of land taken. The evil might well be denominated inequality of benefits and burdens among adjoining-land owners. You paid for the owner's land in privileges and left him still liable, equally with his neighbors whose lands were untaken, to any and all local assessments that might afterwards be imposed. This was unequal and therefore deemed unjust. Experience proved, moreover, that it led to much abuse of the power of condemnation. A full remedy is found for these evils in the provision in question without at all making it to interfere with the power of assessment. Construed thus, it is in perfect accordance with the leading principle of taxation in the new Constitution—uniformity and equality of burdens. It simply guarantees to the owner of land condemned a full price. When that is paid he stands on a perfect equality with all other owners of adjoining lands, equally liable, as he ought to be, to be taxed upon his other lands with them. He has the full price of his land in his pocket and is an equal participant with them in benefits to adjoining lands. To throw the whole burden upon the others in such a case would be to do them the precise injustice which was done to him under the old Constitution. To do so would be to avoid one evil only to run into another. It would be to avoid the evil of withholding from him a full and fair price for his lands only

to run into the equal evil of paying him two prices for it, the second price being at the expense of his neighbors.

"We think the assessment was legally made, and that the district court erred in holding otherwise."

See also Hart v. Lamphire (7: 679), 28 U. S., 280.

IV.

Estoppel.

Even if the Ohio Statutes authorizing such assessments as the one at bar be unconstitutional, which we deny, it is nevertheless too late for the complainant to urge want of power in the municipality to levy the same. Of course the complainant would have, and still has, the right to dispute the correctness of the assessment, the regularity of subsequent proceedings leading up to the same, or she may claim that it exceeds in amount the limitations allowed by law; but she can not be heard to absolutely deny the power of the municipality to make such an assessment. We maintain that by her failure to assert this claim at the proper time, and by her own conduct, she could not be permitted, at this late day, to have immunity from the lien connived at and invited by herself. After the report of the Board of Improvements and its preliminary recommendation, the first step taken with reference to the appropriation of the complainant's property was the passage by Council (the legislative body of the municipal corporation of Norwood) of Ordinance No. 285. (Page 16 of the record.) This ordinance provided in Section 2 for the assessment which was thereafter levied and which is in controversy in this case, and stipulated that bonds should be issued and sold in anticipation of the collection of the

same, the proceeds of which should be used only to pay the costs and expenses of said appropriation. All subsequent proceedings relating to said condemnation and assessment were founded upon this original ordinance, and upon its validity depended the jurisdiction of the Council and of the courts to proceed further. The passage of a valid and legal ordinance to condemn is a jurisdictional requirement. Section 2 of Ordinance No. 285 is an *essential part of it.* If it falls the entire ordinance is void *ab initio.* Section 2264 of the Revised Statutes of Ohio provides that the lots and lands to be assessed must be "designated in advance." If Section 2 is dropped out entirely, no other provision being made in the ordinance for the payment of the costs and expenses of the proposed condemnation, the inference follows that the same would be paid out of a fund raised by assessment "upon all the taxable real and personal property of the corporation." (Section 2263 Revised Statutes of Ohio.) Now, before any such method of payment could be legal, or condemnation valid, the clerk of the village must first certify that the money required therefor was actually in the treasury at the time to the credit of the proper fund. Section 2702 of the Revised Statutes of Ohio reads as follows:

"No contract, agreement or other obligation involving the expenditure of money shall be entered into, nor shall any ordinance, resolution or order for the appropriation or expenditure of money, be passed by the council or by any board or officer of a municipal corporation, unless the auditor of the corporation, and if there is no auditor, the clerk thereof, shall first certify that the money required for the contract, agreement or other obligation, or to pay the appropriation or expenditure, is in the treasury to the credit of the fund from which it is to be drawn, and not

appropriated for any other purpose, which certificate shall be filed and immediately recorded; and the sums so certified shall not thereafter be considered unappropriated until the corporation is discharged from the contract, agreement or obligation, or so long as the ordinance, resolution or order is in force; and all contracts, agreements or other obligations, and all ordinances, resolutions and orders entered into or passed contrary to the provisions of this section shall be void."

A complete transcript of the proceedings of Council and of the Probate Court of Hamilton County is a part of the testimony in this case, printed in full in the record. There is no certificate of the Clerk of any such character, none was ever made or filed, and it follows therefore that Ordinance No. 285 is void, unless Section 2 thereof is valid. The Ohio courts hold that Section 2702 applies to proceedings to condemn private property for street purposes where the compensation is to be paid from the corporation treasury, Rhodes, *et al.*, v. Toledo, 6 Ohio Circuit Court Reports, page 9; but not where the compensation is to be paid by the issue of bonds or other authorized evidence of indebtedness in anticipation of the collection of the assessment. Tyler v. Columbus, 6 Ohio Circuit Court Reports, page 224. To the same effect, 2d Weekly Law Bulletin, page 251, Ryan, *et al.*, v. Cincinnati; 3d Weekly Law Bulletin, page 843, Cincinnati v. McErlane.

But the complainant admits that she made no objection to the exercise of the right of condemnation (by the Village of Norwood, pursuant to Ordinance No. 285), and that she did not deny the constitutionality of the Statutes of Ohio authorizing such proceedings, and says that such proceedings were, in fact, in conformity to the Statutes of the State of Ohio. A consent verdict was had in the Pro-

bate Court of Hamilton County, and the sum of $2,000.00 was paid to complainant and accepted by her with full knowledge that it was to be met, together with the other costs and expenses incident to the appropriation, by an assessment upon her remaining lands.

Query: By admitting the proceedings to condemn to be in conformity to the Statutes of Ohio did she not confess to the validity, under the laws of said state, of original Ordinance No. 285? The assessment actually levied by Ordinance No. 366 (page 17 of the record) is admittedly in accordance with the provisions, and pursuant to the declarations, of Ordinance No. 285. Was it not the duty of the complainant, if she desired to oppose or contest Section 2 of Ordinance No. 285, either to proceed by answer and cross petition in the Probate Court after the filing of the application therein, or to bring an independent action to enjoin the proposed improvement before the issuance and sale of bonds? She had notice, not only by publication, but also by summons and actual appearance in court in response to the action of Council, and ample time between October 19, 1891, when the original ordinance was passed, and May 15, 1892, when the assessing ordinance, which also provided for the issuance of bonds, went into effect. What was complainant doing all this time? Remaining silent, appearing in the Probate Court by counsel, agreeing with the solicitor of the municipality upon the amount of the verdict to be awarded, submitting the same to the jury, permitting the assessing ordinance to be passed and providing for the sale of bonds (Section 3 of Ordinance No. 366), allowing the bonds to be advertised and sold, and then collecting the $2,000.00 from the village—all without a word of protest or objection, or assertion in the

courts or otherwise of any want of power upon the part of the municipality to levy the assessment, with which to raise the sinking fund to pay said bonds as they should mature. Has she not admitted away any right she may have had to challenge this assessment on the ground of unconstitutionality or want of power? Has not her acquiescence in, and her conduct relating to, the original ordinance and subsequent proceedings of the Council and Probate Court estopped her from seeking, in this action, to overthrow an assessment levied pursuant to the ordinance, the provisions and benefits of which were accepted by her to her profit and advantage? The proceedings of the village were recognized by complainant as legal and constitutional until after she had received the money for a street already open to travel, and upon which a house already fronted. They were not claimed to be invalid until she was called upon to pay the first installments of the assessment. The questions involved here are really in the nature of *res adjudicata*. This whole case turns as much upon the original ordinance to improve (No. 285) as upon the assesssment ordinance itself (No. 366); for the plan and intention of the one is only carried into actual effect and operation in the other. Ordinance No. 285 was sustained and proceedings had thereunder without objection, exception or appeal in the Probate Court of Hamilton County, Ohio—sustained, in fact, by the express consent of counsel. Such, at least, was the effect of the findings and judgment of that court, the jurisdiction of which in such cases is not here questioned, and the assessment was admittedly levied pursuant to the declarations and provisions of said Ordinance No. 285. In view of her conduct, her admissions and connivance, in order to secure the proposed improvement and

the money paid therefor, the complainant can not now be heard in denial of the power of the village (after it has proceeded in good faith and incurred the consequent obligations) to levy the assessment of which she had notice from the beginning. Until it came time to pay the first installment of the assessment, the complainant remained at times a "silent partner" and was at times an active participant in the proceedings. The Supreme Court of Ohio, in the case of Tone v. Columbus, 39 Ohio St., page 281, says in the syllabus:

"1. The principles of estoppel apply as well where proceedings of a corporation are questioned on the ground of the unconstitutionality of the statute under which they are had as where they are attacked upon other grounds, unless such proceedings, or what is sought to be accomplished by them, are *per se* illegal or *malum prohibitum*. Want of power in the corporation may be waived, or an estoppel may rise from failure to assert it at the proper time.

"2. The Act of March 30, 1875, under which the improvement of North High Street was made, having been declared unconstitutional (State, *ex rel.* v. Mitchell, 31 Ohio St. 592), such of the property-owners as petitioned for the privileges of the act, acted as officers of election or commissioners of the improvement, voted at the election for commissioners or actively participated in causing the improvement to be made are estopped from asserting such unconstitutionality.

"3. A petitioner for the privileges of the statute will be estopped to deny the power under it of the city to grant his petition, but the mere fact of the petitioning will not estop him from objecting that the subsequent proceedings of the city have been conducted in violation of the requirements of the statute.

"4. Such petitioner has the right to assume the per-

formance of its duty by the city council, which was, before acting upon the petition by ordering the improvement, to ascertain whether a sufficient number had signed to confer jurisdiction.

"5. Active participation in causing the improvement to be made will estop the party engaged therein from denying the validity of the assessment; but to create an estoppel from silence merely it must be shown that the owner had knowledge: 1. That the improvement was being made; 2. That it was intended to assess the cost thereof, or some part of it, upon his property; 3. That the infirmity or defect in the proceedings existed which he is to be estopped from asserting, and 4. It must appear that some special benefit accrued to his property from such improvement which it is inequitable, under the circumstances, he should enjoy without compensation.

"6. While such owner is presumed to know of the invalidity of the statute, a presumption of knowledge does not exist as to one who is silent merely with regard to the illegality of the proceedings of the council, or public officers, which he has the right to assume are regular until he has knowledge to the contrary."

That an abutting property owner, by an unmistakable assent to proceedings which are intended to charge his property with a proportionate part of the expense of a public improvement, or, by acts of approval or encouragement manifested during the progress of the work to those engaged in it, may waive a constitutional as well as a statutory objection to such proceedings; that silence may work an estoppel, and that a person may by his silence waive all the right to an injunction; are principles well sustained by authority.

(See citations by counsel in Tone v. Columbus, on page

293. Also City of Cincinnati v. Manns, 54 Ohio St., page 257.)

It seems reasonable to suggest, in any event, that if there was want of power to assess in the manner proposed by Ordinance No. 285, there was want of power to condemn under that ordinance, and that, for reasons herein stated more fully upon another page, that ordinance was void. If it was void, the subsequent proceedings thereunder were invalid, the village has not acquired legal title to the land taken, and the assessment should not be enjoined unless the complainant be required, as a condition precedent, to return the $2,000.00 paid to her as compensation, together with 6 percent interest from date of payment. The bonds have been drawing interest since June 15, 1892. We respectfully submit that the decision of the Circuit Court is not justified by the facts of this case, and that the same should be reversed.

WM. E. BUNDY,
Solicitor of the Village of Norwood,
Of Counsel for the Appellant.

Supreme Court of the United States

OCTOBER TERM, 1897.

NO. 269.

THE VILLAGE OF NORWOOD,

Appellant,

v.

ELLEN R. BAKER

Appellee.

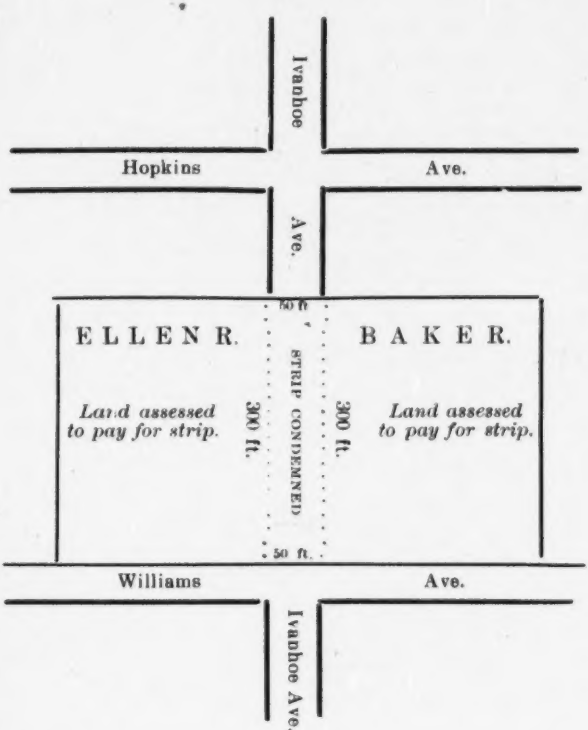
BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

I am not content with the statement of this controversy in the brief of opposing counsel, or rather with his way of putting it.

The village of Norwood, situated in Hamilton county, a municipal corporation under the laws of Ohio, desired to become the owner of a strip of ground 50 by 300 feet belonging to Ellen R. Baker, the complainant below; this

strip is indicated by the space between the two dotted lines in this diagram, which shows the situation of the real estate owned by her, and now involved in this controversy.



I insert this because the diagram in the record, page 38, unless considered in connection with the descriptions by metes and bounds, and the situation of the property, hardly conveys the right idea of the situation.

In December 1891, the village began an action in the Probate Court of Hamilton County, Ohio, against complainant to assess the value and condemn this strip shown between the dotted lines, and to take it for its own purposes.

Municipal corporations such as the village of Norwood are invested with authority to do this in Ohio by section 1692 of the Revised Statutes, which gives a village generally the power to appropriate private property for the use of the corporation; and by section 2232 which provides that a village may appropriate, enter upon and hold real estate within its corporate limits for certain public purposes.

Sections 2233 et seq. provide a statutory procedure in eminent domain, in the way of a declaration by council of a determination to appropriate and the beginning of an action in the probate court to assess the valuation of the real estate proposed to be taken, a form of trial by a jury, the ascertainment of the value of the real estate proposed to be taken, and the election by the village council to take it at the so ascertained value, and the payment of the money.

These statutes are entirely similar to such legislation in most of the states.

In this case the village of Norwood, observing the usual and statutory formalities, began an action in the Probate Court of Hamilton county to condemn and acquire title to the property referred to. There was a verdict by a jury fixing the value of the strip 50 by 300 feet, at $2,000. The village thereupon took the property and paid my client the money.

Then the village did the thing that is complained of in

this action, and out of which this controversy arises. Having taken the property and paid the $2,000 for it, the village added to this $2,000 the costs of the probate court in the condemnation suit, the fees of the counsel who brought and conducted it, and of expert witnesses as to value, certain expenses of advertising, printing and sundry other charges, and levied an assessment for this total amount, $2,218.58, upon the remaining adjacent abutting real estate of Ellen R. Baker, located on either side of the condemned strip so taken by the village, levying an assessment by the front foot upon the property of the complainant facing the strip so taken upon both sides.

The assessment being made payable to and in favor of the village, the effect of it was that the village, by this attempted assessment, would get back from Ellen R. Baker the $2,000 paid her for the land, and the various costs of the condemnation suit, counsel fees and expert fees, advertising, printing and other charges added.

Any right in the village of Norwood to make any such assessment, if right it has, must be found in the following sections of the statute.

"Sec. 2263: When the corporation appropriates, or otherwise acquires, lots or lands for the purpose of laying off, opening, extending, straightening, or widening a street, alley, or other public highway, or is possessed of property which it desires to improve for street purposes, the council may assess the cost and expenses of such appropriation or acquisition, and the improvement, or of either, or of any part of either, upon the general tax-list, in which case the same shall be assessed upon all the taxable real and personal property in the corporation."

"Sec. 2264: In the cases provided for in the last section, and in all cases where an improvement of any kind is

made of an existing street, alley or other public highway, the council may decline to assess the costs and expenses in the last section mentioned or any part thereof, or the costs and expenses or any part thereof of such improvement, except as hereinafter mentioned on the general tax-list, in which event such costs and expenses, or any part thereof which may not be so assessed on the general tax-list, shall be assessed by the council on the abutting and such adjacent and contiguous or other benefited lots and lands in the corporation, either in proportion to the benefits which may result from the improvement, or according to the value of the property assessed, or by the foot front of the property bounding and abutting upon the improvement as the council, by ordinance setting forth specifically the lots and lands to be assessed, may determine before the improvement is made, and in the manner and subject to the restrictions herein contained; and the assessments shall be payable in one or more installments, and at such times as the council may prescribe; * * * "

On a demand from the village, of payment, the complainant below declined to pay this assessment; thereupon the clerk of the village of Norwood, by virtue of section 2265 which authorizes such a course to enforce the collection of assessments, certified such assessment to the county auditor of Hamilton county, who proceeded to enter the assessments against the real estate of the complainant so assessed upon the general county tax duplicate, and certified the same to the county treasurer, who proceeded to collect them with and as taxes are collected, the assessment becoming, like taxes, a lien upon the real estate.

The complainant brought this action in the court below to enjoin the collection of this assessment, setting forth the facts in detail in her complaint, record pages 1 to 6 inclusive, alleging that the collection of this assessment was un-

constitutional, and therefore illegal; averring it was in effect and fact sheer confiscation of her property by the village.

The right to maintain an action by injunction to prevent the collection of illegal assessments in Ohio is given by sec. 5848. The court below sustained the bill and enjoined the assessment. The village now appeals.

The purpose for which the village of Norwood desired to acquire this strip of real estate, I respectfully submit, cuts no figure; whether it was for a street, or a school house, an engine house or water-works station; the principle involved is precisely the same.

If the village of Norwood had demanded of Ellen R. Baker that she present to the village this strip of ground 50 feet by 300 feet, she had better submitted to the demand and given up her property. It would have been less expensive.

If the village of Norwood had entered upon her property and taken it by force, refusing her payment therefor, she had best submitted and allowed her property to be so taken from her. It would have been less expensive.

Because taken under claim of color of law, and under claim that a statutory curriculum has been followed, it is none the less apparent that whatever the method pursued, it means simply and only that her property is to be taken from her without compensation, with an added expense put upon her of the costs incurred by the village in so taking it from her.

Can it be done?

This is the very simple question that is now presented for solution, and is the entire controversy.

I respectfully submit that the attempt made to take the complainant's property by condemnation proceedings, and then to force her to foot this bill by assessment proceedings on her remaining abutting property, is in violation of the fifth amendment of the Constitution of the United States, which provides "Nor shall private property be taken for public use without just compensation."

And is in violation of section one of the fourteenth amendment which provides "Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

And is in violation of the bill of rights of the Constitution of Ohio that provides that "Private property shall not be taken for public use without compensation therefor made in money, without deductions for benefits to any property of the owner."

THE LAW OF THE CASE.

In November, 1885, the city of Toledo by its common council undertook to appropriate the property of one Scott and another by appropriating and assessing ordinances, exactly as the village of Norwood attempted in the case at bar.

An action was begun in the U. S. Court by Scott against the city to enjoin the collection of the assessment of the costs and expenses, which included the value of the land of complainant, upon the complainant's remaining land.

That action was tried to the late Mr. Justice Howell

E. Jackson, who was then the judge of the United States Circuit Court in this circuit. The question involved in that case is identical with this.

The opinion of Mr. Justice Jackson in that case covers the entire controversy here.

The learned court who tried this cause below, as it will appear from the opinion of Judge Sage, see record pages 26-28, after a statement of the case, rests his judgment upon the opinion of Judge Jackson in Scott v. The City of Toledo, 36 Fed. Rep., 385.

For me to attempt to debate in this brief the question that Judge Jackson so lucidly and with so much learning discusses and decides in the Scott case, would be for me to attempt to clothe in language other than his, the statement of principles that governed his judgment and moved his decision in that cause.

I would not undertake such a task. No argument that I could make, would present to this court that which ought to be said in behalf of my client's cause, as does the opinion of that learned judge.

I therefore quote for the convenience of this court lengthily from the opinion, and submit it in support of my contention that it is not possible for any municipality, under the guise of statutory authority, to take even by indirection private property without compensation, under the plea that there has been a "due process of law."

Judge Jackson, beginning upon page 387, says:

No question is made as to the power and authority of the common council of Toledo, under the constitution and laws of Ohio, to appropriate private property for the pur-

pose of laying out and opening streets, which may be deemed necessary or convenient for the public use, upon making just compensation to the owner of the property so taken. To effectuate such appropriation, where the parties cannot agree upon the price of the property taken, or sought to be acquired, the city must apply to certain designated courts for a condemnation of the land wanted, and to determine the owner's compensation therefor and his damage to the remaining property, which are to be ascertained and assessed by a jury. The details of such proceedings in court are not involved in this case, and need not be specially noticed. The city of Toledo, under the ordinance in question, had the undoubted right to apply to the courts of the state for a condemnation of the property sought to be appropriated for the extension of Woodruff avenue, and to have fixed and ascertained, by a report of a jury, the compensation and damages that should be paid the owners therefor. But in making such application to the court there is no provision of the law allowing or authorizing the owner of the property sought to be taken to inquire into or contest the validity of such an assessment as that made by the ordinance in question. Such court proceedings would relate only to an ascertainment of the compensation and damages to be allowed the owner upon the condemnation of his property. In ascertaining the compensation and damages that should be awarded the owner of the property sought to be appropriated to such public use, the constitution of the state requires such compensation to be "first made in money, or first be secured by a deposit of money;" and that it "shall be assessed by a jury, without deductions for benefits to any property of the owner." Article 1, sec. 19. And by article 13, sec. 5, of said constitution, it is further provided that "no right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money, or first secured by a deposit of money, to the

owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law." Under these provisions of the organic law of the state, it seems clear that no benefits which might result to complainants or to their adjoining and abutting property from the laying out, opening and extension of Woodruff avenue could be lawfully estimated in reducing or offsetting the compensation to which they would be entitled for the appropriation of their property to the purpose contemplated by said ordinance.

For so much of their property as the city needed for the proposed extension of Woodruff avenue they were entitled, by the requirements of the constitution, to full compensation in money, "without deduction for benefits to any property" belonging to them resulting from such proposed improvement. The general assembly, in the organization of cities and incorporated towns or villages, as they were empowered to do by general laws, could not confer upon such municipalities or the courts any authority to disregard these provisions of the constitution relating to the manner in which compensation for private property taken or appropriated for public use should be ascertained and paid for. The statutes of the state relating to the right of cities and incorporated villages to appropriate private property for streets or other public purposes, or conferring upon them power and authority to levy taxes or make special assessments for local improvements, should, therefore, be read and interpretated in the light of these provisions of the fundamental law. The authority under which the assessment made in and by the ordinance in question is sought to be sustained, is found, as defendant's counsel insist, in sections 2263, 2264, 2267, and 2271 of the state statutes, which provide as follows:

"Sec. 2263. When the corporation appropriates or otherwise acquires lots or lands for the purpose of laying

off, opening, extending, straightening, or widening a street, alley or other public highway, or is possessed of property which it desires so to improve, the council may assess the cost and expenses of such appropriation or acquisition, and of the improvement, or of either or of any part of either, upon the general tax-list, in which case the same shall be an assessment on all the taxable real and personal property in the corporation.

"Sec. 2264. (as amended April 20, 1881.) In the cases provided for in the last section, the council may decline to assess the costs and expenses therein mentioned, or any part thereof, except as hereinafter mentioned, on the general tax-list, in which event such costs and expenses, or any part thereof which may not be so assessed on the general tax-list, shall be assessed by the council on the abutting and such adjacent and contiguous or other benefited lots and lands in the corporation, either in proportion of the benefits which may result from the improvement, or according to the value of the property assessed, or by the foot front of the property abutting upon the improvement, as the council by ordinance setting forth specifically the lots and lands to assessed, may determine before the improvement is made, and in the manner and subject to the restrictions herein contained; and the assessments shall be payable in one or more installments, and at such times as council may prescribe." 78 Ohio Laws, 259.

"Sec. 2267. No public improvement, the cost or part of the cost of which is to be specially assessed on the owners of adjacent property, and no order appointing assessors of damages or confirming their report, shall be made without the concurrence of the council, and it shall be essential that two-thirds of the whole number of the members elected to the council concur, unless two thirds of the owners to be charged petition in writing therefor."

"Sec. 2271, (as amended May 4, 1885.) In cities of the first class, and in corporations in counties containing a city of the first grade of the first class, the tax or assessment specially levied or assessed upon any lot or land for any improvement shall not, except as provided in section twenty-two hundred and seventy-two, exceed twenty-five per centum of the value of such lot or land after the improve-

ment is made, and the cost exceeding that per centum shall be paid by the corporation out of its general revenue; and, except as provided in section twenty-two hundred and seventy-two, there shall not be collected of such assessment in any one year more than one-tenth of such value of the property on which the assessment is made; and in cities of the third grade, first class, said tax or assessment shall not exceed twenty five per centum of the value of such lot or land after the improvement is made; and whenever any street or avenue is opened, extended, straightened or widened, the assessment for the cost and expense thereof shall be assessed only on the lots and lands bounding and abutting on said street or avenue so improved: provided, that nothing in this section contained shall apply to any improvement ordered commenced, or completed prior to the passage of this act." 82 Ohio Laws, 260.

In connection with this and other sections of the statutes relating to the subject of municipal improvements, counsel for the city of Toledo cite and rely upon the case of *Cleveland* v. *Wick*, 18 Ohio St., 303, in which the Supreme Court of Ohio, construing the constitution and statutes of the state, held that a municipal corporation had authority to levy an assessment upon lands fronting on a street, to reimburse the corporation for the amount of compensation paid the owner for his other land taken for the street, and for expenses incurred by the city in its improvement as a highway, and that such action was not in violation of the constitutional provision requiring full compensation in money to be paid the owner "without deduction for benefits." In that case it will be noticed, the appropriation of and payment for the property, and the assessment to reimburse the city for its expenses and outlays thereby incurred, were separate, distinct, and disconnected acts. Some time after the property had been condemned, and the owner paid therefor "without deduction for benefits," the city of Cleveland made a front-foot assessment on all the property abutting on the street including that of the party whose property had been previously appropriated, to reimburse the city for

its expenses in laying out and completing the improvement of such street. Its action was sustained, as not being in violation of the constitutional provision requiring the payment of compensation "without deduction for benefits." But in the present case, the ordinance in question does not propose to follow the course pursued by the city of Cleveland. It "does not contemplate the payment of a single penny out of the city treasury" for the property of complainants which it is proposed to appropriate for the public use; on the contrary, the ordinance and assessment therein made expressly provide that "the cost and expenses incident to and resulting from the appropriation, together with all expenses of laying off, opening, and extending and widening and straightening said street, shall be assessed upon the lots bounding and abutting upon said Woodruff avenue," between the designated points. By section 2249 of Ohio Statutes the costs occasioned by the inquiry and ascertainment of the owner's compensation for property appropriated are required to be paid by the corporation; but under this ordinance and assessment, the owners of the property proposed to be taken are required to pay such costs. By the provisions of the constitution the owners are entitled to be paid full compensation in money for the value of their property appropriated, which includes damage to their remaining property, "without deduction for benefits to any property;" but under the actual operation of the ordinance and assessment in question, the complainants are required to pay in full for their own property appropriated to the public use of the city. The city proposes to acquire the complainants' property "without the payment of a single penny out of its treasury," and without entering into any obligation involving the expenditure of money out of the general or other funds of the city. By section 2271 (as amended May 4, 1885), it is provided that special assessments levied or assessed upon any lot or land for any im-

provement shall not (except as provided in section 2272) exceed twenty-five per centum of the value of such lot or land after the improvement is made; but by the ordinance and assessment under consideration the special assessment made on the property of complainants, as shown by the agreed statement above quoted, largely exceeds this limitation Again, by section 2283 it is provided that, "so far as practicable under the provisions of this title, regard must be had, in making special assessments, to the probable benefits to the property assessed." The ordinance and special assessment in this case entirely disregard that requirement of the law, which appears to have been observed in *Cleveland* v. *Wick*, *supra*. Again, by section 2286 it is provided that "the owner shall not be liable, under any circumstances, beyond his interest in the property assessed at the time of the passage of the ordinance or resolution to improve;" but in the present case the front-foot assessment on the remaining property of complainant Scott will amount to $1,500 or $2,000, while the lot on which it is assessed does not exceed in value the sum of $700. It may well be doubted whether the decision of the supreme court of Ohio in *Cleveland* v. *Wick*, 18 Ohio St., 303, will sustain such a proceeding as the scheme devised by the common council of Toledo for acquiring the property of complainants without expense to said city. This court is inclined to the opinion that the present is, in many essential particulars, distinguishable from the case of *Cleveland* v. *Wick*, and that its proper determination is not controlled by that decision, even considering the questions here involved alone under the constitution and laws of Ohio. The decision of the Supreme Court of Ohio in *Cleveland* v. *Wick*, in its construction of the state constitution and statutes, is, of course, conclusive on this court upon the question there represented; but whether that goes to the extent of sanctioning a procedure on the part of the municipalities like the one in question, designed and in-

tended, in advance, to make the owner of the property pay for its appropriation to public use, admits of serious doubt and question.

But the questions raised and involved in the present case do not depend alone upon the proper construction of the constitution and statutes of Ohio. It is urged on behalf of complainants that, even admitting the constitution and laws of the state, as construed in *Cleveland* v. *Wick*, or otherwise, authorize such an ordinance and assessment as the one here involved, such a proceeding is in violation of that provision of the fourteenth amendment to the constitution of the United States which declares: "Nor shall any state deprive any person of life, liberty, or property without due process of law." It is claimed that the ordinance and assessment in question, if sanctioned by the statutes and constitution of Ohio, is "without due process of law." This, of course, presents a federal question, which must be settled and determined by subjecting the Ohio statutes and constitution, and the proceedings of the common council of Toledo here called in question, to the test of the requirements of the constitution of the United States as embodied in the fourteenth amendment.

Counsel for complainants, on this branch of the case, submit for consideration, upon the facts, two leading and general questions of law:

"(1)—May a municipal corporation appropriate private property for the purposes of a public highway, and compel the owner thereof to repay to the corporation, by an assessment upon his remaining property, not only the entire amount which it has paid him for the property appropriated, but also the costs and expense of ascertaining that amount, and the damages resulting to such remaining property from the taking of the property appropriated?

(2) May private property be appropriated for public uses, and a charge levied to pay therefor, without affording the person whose property is to be charged a time,

place, or tribunal where he may be heard, before the liability for such charge is finally established, and the amount thereof definitely fixed."

Upon the first proposition it is insisted on behalf of complainants that compensation for private property taken for public uses is an essential element of that "due process of law" without which the citizen can not be lawfully deprived of his property. For the defendant it is claimed that "the fourteenth amendment does not prohibit the taking of private property by a state without compensation;" in other words, that the appropriation of private property for public use, without compensation to the owner, is not depriving him of his property "without due process of law." Counsel for defendant further say that, "even if 'due process of law' be held to require compensation, the kind of compensation may still be determined by the state, and, in the absence of express constitutional provision to the contrary, the property may be compensated for in special, benefits, and it is clearly within the province of the state to provide for estimating this compensation in any manner which involves 'due process of law',—that is, notice and a hearing." We need not pause to consider this latter proposition. It is not material to the present case. It suggests a question not here involved, because it clearly appears from the pleadings, exhibits, and agreed statement of facts that no "special benefits" will inure to complainants from the appropriation of their property, but, on the contrary, that it will result in damage to their remaining property. It would be an anomaly to say that property is specially "benefited" by the same act which damages it. A further reason for not discussing this last suggestion of defendant's counsel as to the right of the state to determine the kind of compensation that shall be awarded the owner for property taken for public use, is found in the fact that the action of the common council of Toledo herein called in question, as counsel

for defendant admits, is not an attempt to pay for the property to be appropriated by the benefits resulting to other property from the appropriation. If such had been the true character of the proceeding, it would clearly violate the provisions of the state constitution, and, independent of the federal questions involved, would entitle complainants to enjoin its enforcement. The single question is therefore presented, whether, in the taking of private property for public use, "due process of law" requires that compensation shall be made to the owner for the property so appropriated. In other words, may a state, or any subordinate division thereof, since the adoption of the fourteenth amendment to the constitution of the United States, take the property of its citizen for public purposes without making him compensation therefor? Does "due process of law," without which the citizen cannot, under this fourteenth amendment, be deprived of his property by the state, involve as a necessary and essential ingredient the payment or the making of compensation for private property appropriated to public use? This precise question has not yet been passed upon, either by the Supreme Court of the United States or the state courts, so far as we have been able to discover, and it must therefore be considered and determined upon the general principles applicable to the subject.

No attempt will be made to define the exact scope of the terms, "due process of law". No court has yet succeeded in giving to these words an exact definition applicable to all the varied cases in which they may be involved. The supreme court has said (*Davidson* v. *New Orleans*, 96 U.S. 104) that, instead of attempting to define what constituted "due process of law", it was wiser, in ascertaining the intent and application of such an important phrase in the federal constitution, to adopt the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, and thus, by actual application, give to the words

their proper meaning. In a general sense "due process of law" is identical in meaning with the phrase, "law of the land", as used in the constitutions of the several states. Cooley, Const. Lim. 432. As applied to the appropriation of private property for public uses under the power of eminent domain, "due process of law" clearly does not mean mere legislative enactments, nor simple compliance with the forms of law, nor even constitutional provisions, if they be inconsistent with previously established legal rights. Thus, in Cooley, Const. Lim. 433, it is said:

"That construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense."

And, again, (at p. 435:)

"The principles, then, upon which the process is based, are to determine whether it is due process or not, and not any considerations of mere form * * *. When the government, through its established agencies, interferes with the title to one's property, or with his independent enjoyment of it, and its action is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional protection which have become established in our system of laws, and not generally by rules which pertain to forms of procedure merely * * *. 'Due process of law,' in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

To the same effect is the language of the supreme court in *Davidson* v. *New Orleans*, 96 U. S. 102, where the court, speaking by Mr. Justice Miller, after explaining the reasons why the phrase "law of the land", as used in *magna charta*, was not directed against the enactments of parliament, proceeds to say:

"But when, in the year of grace 1866, there is placed in the constitution of the United States a declaration that

'no state shall deprive any person of life, liberty, or property without due process of law,' can a state make anything due process of law which, by its own legislation it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is affected under the forms of state legislation. It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law within the meaning of the constitutional provision."

In this case of *Davidson* v. *New Orleans*, 96 U. S. 107, Mr. Justice Bradley said:

"If a state, by its laws, should authorize private property to be taken for public use, without compensation, * * *. I think it would be depriving a man of his property without due process of law * * *. I think, therefore, we are entitled, under the fourteenth amendment, not only to see that there is some process of law, but 'due process of law,' provided by the state law, when a citizen is deprived of his property; and that in judging what is 'due process of law', respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law'; but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law'."

In the *Kentucky Railroad Tax Cases*, 115 U. S. 331, 6 Sup. Ct. Rep. 57, this language of Mr Justice Bradley is quoted with approval by the supreme court. It is a fundamental principle of the common law, established and well settled before the adoption of the federal constitution, that the proper and lawful exercise of the sovereign right of eminent domain involves these two essential elements, viz., that the property must be taken for the public benefit or for public purposes, and that the owner must be compensated therefor.

The exercise of the power of eminent domain is, in legal effect, nothing more than an enforced sale, for the public benefit, at a fair price, to be ascertained in some proper mode, and to be paid the owner for the property so appropriated. This long and firmly established principle hardly requires any discussion or citation of authority in its support. It is thus clearly and forcibly expressed by one of the earliest and ablest law writers:

"So great, moreover, is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man or set of men to do this without consent of the owner of the land. * * * In this and similar cases the legislature alone can, and indeed, frequently does, interpose and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price, and even this is an exertion of power which the legislature indulges with caution, and which nothing but the legislature can perform." Cooley, Bl. bk. 1, p. 137.

In the same work, (book 2, p. 35, note), on the subject of "Ways," it is said:

"A public way is established either by the dedication of the owner of the land or by an appropriation of the land for the purpose by the sovereign authority, under what is called the 'right of eminent domain.' When this right is exercised, it must be in pursuance of some express legislative authority which prescribes the formalities, and compensation must be made to the owner."

So, too, in Mills Em. Dom., sec. 1, it is said on this subject:

"The annals of all nations enjoying a constitutional gov-

ernment, and of many despotic nations, show that the moral sense of mankind requires such compensation. In the absence of provisions in the constitution, the courts have considered that the principle was so universal and fundamental that laws not recognizing the right of the subject to compensation would be void."

These well recognized principles, vital to the security, and essential to the protection, of the citizen against the arbitrary exercise of power on the part of the government, were in full force at the adoption of the constitution of the United States. They were not, however, fully recognized in that instrument as originally adopted. The fifth amendment, providing that private property should not be taken for public use without just compensation, was accordingly required for the better security of private property against the power of government. This amendment to the constitution which recognized and secured to the citizen, as a fundamental principle, the right to compensation for private property taken for public use, was intended as a limitation upon the federal power. The first ten amendments to the constitution recognized and secured to all citizens certain rights, privileges and immunities essential to their security. The fifth amendment, operating only as a limitation upon the powers of the general government, fell short of giving to the citizen the full protection to which he was entitled in respect to his life, liberty, and property, so far as state action was concerned. It imposed no prohibition or limitation upon the power and authority of the states in dealing with the life, liberty and property of the citizen. They were left to the restraints of their several constitutions and respective laws on these subjects. So far as the states were concerned, citizens of the United States were thus left without adequate protection and security in their persons and property. The fourteenth amendment was adopted to remedy and correct this defect in the supreme organic law of the land. It involves no forced or unreasonable construction to hold that this four-

teenth amendment, as applied to the appropriation of private property for public uses, was clearly intended to place the same limitation upon the power of the states which the fifth amendment had placed upon the authority of the federal government, and as Judge Cooley well remarks:

"Of these amendments it may be safely affirmed that the first ten took from the Union no power it ought ever to have exercised, and that the last three required of the states the surrender of no power which any free government should ever employ."

Whatever may have been the power of the states on this subject prior to the adoption of the fourteenth amendment to the constitution, it seems clear that since that amendment went into effect, such limitations and restraints have been placed upon their power in dealing with individual rights that the states can not now lawfully appropriate private property for the public benefit, or to public uses, without compensation to the owner; and that any attempt so to do, whether done in pursuance of a constitutional provision or legislative enactment, whether done by the legislature itself or under delegated authority by one of the sub-ordinate agencies of the state, and whether done directly by taking the property of one person and vesting it in another, or the public, or indirectly, through the forms of law, by appropriating the property and requiring the owner thereof to compensate himself, or to refund to another, the compensation to which he is entitled, would be wanting in that "due process of law," required by said amendment. The conclusion of the court on this question is, that since the adoption of the fourteenth amendment, compensation for private property taken for public uses, constitutes an essential element in "due process of law," and that without such compensation the appropriation of private property to public uses, no matter under what form of procedure it is taken, would violate the provisions of the federal constitution. There is no

difference in principle between the case put by Mr. Justice Miller, as an illustration, in *Davidson* v. *New Orleans*, 96 U. S., 102, viz., the taking property from A. and vesting it in B., and the taking of property from an individual and vesting it in the public. "Due process of law" is equally wanting in both cases; in the latter case, because such a taking, without making compensation to the owner, is nothing short of legalized robbery, or confiscation for the benefit of the public. If therefore the statutes of Ohio, whether in harmony with the state constitution or not, authorize the city of Toledo to appropriate the property of complainants for the purpose of a public highway, and to do this in a way which will not only exempt it from the duty and obligation of compensating them for the property taken, but impose upon complainants themselves, under the form of an assessment by the foot front, the burden of compensating themselves or of returning to the city all they may be entitled to receive as compensation for their property, such statutes are wanting in that "due process of law" required by the federal constitution; and the attempted proceedings had thereunder by the common council of Toledo are void, so far at least, as said assessment is concerned.

In the case of Chicago, B. & Q. R. Co. v. City of Chicago, 166 U. S. 226, this court, on page 238 of its opinion, approves the reasoning and conclusions of Judge Jackson in Scott v. City of Toledo, 36 Fed. Rep. 385-396, and quotes at some length from his opinion, and in that same connection, upon page 239, this court refers with approval to the judgment of Judge Sage in this very case at bar, Baker v. Village of Norwood, 74 Fed. Rep., 997. This would seem to be decisive.

It is urged, however, by counsel in his brief that section 5848 of the Revised Statutes of Ohio gives one an oppor-

tunity to have determined by injunction in a trial in the local courts, the legality of the assessment, and that therefore this is in some way a due process of law.

But if a man's property is taken from him by condemnation proceedings, and the money so paid him in such proceedings is attempted to be taken from him by assessment under another statute, such assessment proceedings cannot be said to become legal because he whose property is thus assessed is given leave by statute to maintain an action in injunction by which he may legally try the question as to whether or not such assessment is legal and valid.

The forum created by section 5848 of the Revised Statutes of Ohio cannot be said to exclude the right of a citizen of Ohio to go into the federal court, and there litigate the constitutional questions involved in the taking of his property without compensation. The purpose of this section was only to authorize a proceeding by injunction, for without it the only remedy a tax-payer would have to contest an illegal assessment would be to pay it under protest and then bring an action to recover the money in a suit against the county treasurer.

The federal court furnishes a proper forum where a citizen may challenge the right of a municipality to confiscate his property, and in such action brought in such a forum it is no answer to say that his property has been confiscated by due process of law, because the state law under which the municipality assumes to act, provides a forum in which the citizen may undertake to redress his wrong by an action for injunction if he sees fit to appeal to it.

Nor did Judge Jackson, after his decision in the Toledo case, sustain a similar assessment to the one herein contested, as urged by counsel in his brief, pages 8 and 9, referring to Murdock v. The City of Cincinnati, reported in a local reporter. What Judge Jackson held in that case was, that where a municipality brought a suit to collect an assessment instead of certifying it to the county auditor and treasurer for collection as if a tax, that such suit afforded a tax-payer resisting the payment of the assessment, an ample forum in which to contest its validity. And that so trying such a question in such a forum, he must abide the decision of that forum.

For if, in a case like the one at bar, a citizen resisting the payment of an assessment, were held to pay it by a local court, and this should be sustained by the Supreme Court of Ohio, he would still have the right to come to this court on error and have the constitutional questions determined, if it were such a case as this, as to whether or not his property could be confiscated without compensation, and without due process of law, and this notwithstanding a statute in Ohio and the Supreme Court too declared that it could.

Returning to a consideration of the brief of counsel as justifying assessments, such as the one at bar, counsel cite three cases decided by the Supreme Court of Ohio, the first of which, Cleveland v. Wick, 1 Ohio St., 304, is examined and reviewed by Judge Jackson in Scott v. City of Toledo, supra.

Of Caldwell v. The Village of Carthage, 49 Ohio St., 334, which he likewise cites, Judge Sage in his opinion in the case, 74 Fed. 997, says the following, on page 999:

"It was held by the Supreme Court of Ohio in Caldwell v. Village of Carthage, 49 Ohio St., 334, that where land is appropriated for a street improvement, an assessment by the foot front of the property bounded by and abutting upon the imporvement, to pay the cost thereof, is not in violation of section 1 of the fourteenth amendment of the constitution of the United States. There the specific objection was that no preliminary resolution declaring the necessity of the improvement which the council of the village was required to pass, and to give notice of and publish as provided in section 2304 of the Revised Statutes, was adopted by the council, and consequently no publication was made, nor was there any service of notice of such resolution. The supreme court held that the section did not apply to the condemnation of private property for opening, extending, straightening, or widening a street. It does not appear that the general question of constitutional power which is presented in this case was presented to the court in that case, or was considered."

The other case cited by counsel, Crumbaugh v. Cincinnati, 29 Ohio St., 69, is not different from the two that are referred to by Judges Jackson and Sage in their opinions.

But assuming that the Supreme Court of Ohio has undertaken to decide and has decided that a municipality in Ohio may seize a man's property with one hand and take from him the money with which to pay for it with the other. The fact that such a proceeding was broadly authorized and warranted by statute and confirmed by the Supreme Court of Ohio, would not constitute due process of law, or prevent in any degree or way, the right of the federal court

in this action to say whether or not such a proceeding of confiscation was constitutional or tolerable.

Due process of law does not mean alone the enactment of statutes by a legislature. It means more than a special act authorizing a deprivation. It means the law in its regular course of enactment, interpretation and administration through the courts of justice.

Clark v. Mitchell, 64 Mo. 564;

Atchison Etc. R. R. Co. v. Vaty 6 W. L. B. 37;

Taylor v. Porter, 4 Hill (N. Y.) 140;

Hock v. Henderson, 4 Dev. (N. Car.) 15;

Jones v. Perry, 10 Yerg. (Tenn.) 59.

In re Ziebold, 19 Repr. (U. S. Cir.) 742, it was held that due process of law had a broader meaning than the process prescribed by act of a legislature. That such a construction would render a constitutional guarantee mere nonsense. That this would mean that no state should deprive a person of life, liberty or property unless the state elected to do so. That the terms "due process of law" and the "law of the land" have a broader and more comprehensive meaning, originating in Magna Charta itself, and operating on every branch of the civil government.

In Stuart v. Palmer, 74 N. Y. 183, it was held that this constitutional limitation extended to executive and administrative, as well as to judicial proceedings.

Counsel cites three decisions of this court. Why they are cited by him as authorities in support of his contention,

I do not understand. Two of them are authorities against him, I respectfully submit, and one is not in point.

In Fallbrock Irrigation Dist. et al v. Bradley et al, 164 U. S., 112, this court held that the provision of the fourteenth amendment regarding the taking of private property is a prohibition against the state, and does not apply to the taking of the property of one citizen by a corporation other than municipal or another citizen. So, too, was it held in United States v. Cruikshank 92 U. S. 542-554. But in each of these cases this court clearly points out the distinction and difference between this and a state taking private property.

The case of the C., B. & Q. R. R. Co. v. Chicago, 166 U. S. 226, I have already referred to. As I have said, the opinion of Mr. Justice Jackson in Scott v. City of Toledo, 36 Fed. Rep. 385, and the opinion of Judge Sage in this very case, Baker v. The Village of Norwood, 74 Fed. Rep. 997, are quoted with approval.

It holds that the prohibition of the fourteenth amendment refers to all the instrumentalities of the state, legislative, executive and judicial. That in determining whether or not a citizen has been deprived of his property without due process of law, regard must be had to substance, and not to form.

And that, however a state court might interpret state statutes, any scheme that under the guise of law deprived a citizen of his property, though confirmed by the courts of the state of final authority, if contrary to the constitution, should not be sustained, and relief would be granted by the federal court. I cite this case as sustaining every proposition of law for which I contend in this hearing.

In no aspect can it be considered an authority supporting any of the contentions of the counsel for the appellant.

The other case cited by the learned counsel is that of Bauman v. Ross, 167 U. S. 548 that, I respectfully submit is not in point at all. That case holds that where an act of congress, operative in the District of Columbia, touching its highways, provided a jury or commission or tribunal, that in levying assessments for the construction of highways in the District of Columbia, on notice to the property holder examined and took into consideration the damages or benefits done to the property adjacent to the highway about to be built, and thereupon deferring to these, fixed the assessments for the construction of the highway upon adjacent property, each in its proper proportion, such a law was not unconstitutional. But that is not the case at bar, for we are concerned with no such question.

The only question here is, as to whether or not under form of any statutory law in Ohio, the village of Norwood may, under its cover and by its authority, compel one of its citizens to stand and deliver up her property, and so delivering it compel her to pay, in addition thereto, the cost of the equipment of the force that assumes charge of and conducts the expedition.

Can the property of a citizen be absolutely confiscated without any remedy she may invoke to give her redress, and can such a taking of her private property for public use, be justified, not only without compensation, but with the expenses of the taking added?

I deny that this is possible, even if attempted to be done under color of law—that it can be done no more by

indirection than it can directly,—for this court has said, * * * "In determining what is due process, regard must be had to substance, and not to form." 3 syllabus, 166 U. S., 226.

This court has said, too, in this same case, C., B. & Q. R. R. Co. v. Chicago, 166 U. S. 241, "In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment of the constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument."

And in this same case this court has also said, page 235:

"It is proper now to inquire whether the due process of law enjoined by the fourteenth amendment requires compensation to be made or adequately secured to the owner of private property taken for public use under the authority of a state."

"In Davidson v. New Orleans, above cited (96 U. S. 97) it was said that a statute declaring in terms, without more, that the full and exclusive title to a described piece of land belonging to one person should be and is hereby vested in another person, would, if effectual, deprive the former of his property without due process of law, within the meaning of the fourteenth amendment. See also, Missouri Pac. Ry. Co. v. State, 164 U. S. 403, 417, 17

Sup. Ct. 130. Such an enactment would not receive judicial sanction in any country having a written constitution distributing the powers of government among three coordinate departments, and committing to the judiciary, expressly or by implication, authority to enforce the provisions of such constitution. It would be treated, not as an exertion of legislative power, but as a sentence,—an act of spoliation. Due protection of the rights of property has been regarded as a vital principle of republican institutions. 'Next in degree to the right of personal liberty', Mr. Broom, in his work on Constitutional Law, says, 'is that of enjoying private property without undue interference or molestation.' Page 228. The requirement that the property shall not be taken for public use without just compensation is but 'an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down as a principle of universal law. Indeed, in a free government, almost all other rights would become worthless if the government possessed an uncontrolable power over the private fortune of every citizen.'

But if, as this court has adjudged, a legislative enactment, assuming abritrarily to take the property of one individual and give it to another individual, would not be due process of law, as enjoined by the fourteenth amendment, it must be that the requirement of due process of law in that amendment is applicable to the direct appropriation by the state to public use, and without compensation, of the private property of the citizen. The legislature may prescribe a form of procedure to be observed in the taking of private

property for public use, but it is not due process of law if provision be not made for compensation. Notice to the owner to appear in some judicial tribunal and show cause why his property shall not be taken for public use without compensation would be a mockery of justice. Due process of law, as applied to judicial proceedings instituted for the taking of private property for public use, means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against he owner, even if he be admitted to defend, can not convert the process used into a due process of law, if the necessary result be to deprive him of his property without compensation."

See also the opinion of Mr. Justice Earl, in Stuart v. Palmer, 74 U. S., 183, which was expressly approved by Mr. Justice Field, in the Railroad Tax cases, 13 Fed. Rep., 753, and which latter opinion was approved by this court in Spencer v. Merchant, 125 U. S., 351-358.

It is sufficient to conclude with these expositions of the law and resting upon them, abide the issue.

FINALLY.

The claim is made by the counsel for the appellant that in some way the complainant below may not enjoin the collection of this assessment upon a principle of estoppel. The burden of this claim is that, because the village council passed an ordinance declaring its intention to condemn complainant's strip of ground 50 by 300 feet for the purpose of subsequently building a street upon it, and thereupon insti-

tuted proceedings in the Probate Court of Hamilton county to condemn the complainant's property and acquire title to it by the exercise of eminent domain, and the complainant, received the money which was the purchase price of her land that the court and jury fixed, that that act constituted knowledge that the council of the village of Norwood might undertake under an authority claimed to be derived from the statutes of Ohio, to assess back on her abutting property this purchase price, with costs, of the land condemned, and therefore she is estopped from refusing to pay an assessment or contesting the legality of an assessment levied upon her remaining land to raise the money that the village has paid her for the part taken.

Really this would be an extraordinary doctrine. It was not in the power of the complainant to prevent the village of Norwood from condemning any piece of land that may have belonged to her. To say that when condemnation proceedings are begun and carried to a conclusion, and the title taken by a decree of the court, that the complainant takes the money at her peril depending upon how the municipality may use the land, or get the money to pay for it, is a new application of the doctrine of estoppel.

It will be observed that the statutes of Ohio give a council of a village like Norwood, the option either of levying an assessment on all the taxable real and personal property in the corporation, to pay for the cost of necessary real estate acquired for municipal purpose, see section 2263, or it may undertake, by section 2264, what was attempted in this case, to make the property holder pay back the cost of the real estate taken, by assessing it against her remaining property.

The passage of an ordinance by a village is notice to no one. That is to say, it is not such a judicial notice as will affect property rights. But if it were, it was not in the power of the complainant to resist the condemnation of her property. She could not in that action have pleaded, as a means of defeating it, that the village of Norwood intended or might in the future attempt to make her pay back money so received as the value of her land, by an assessment upon her abutting property.

In an action for condemnation, there is but one issue, namely, the value of the property. How, then, can it be claimed that the complainant below was estopped from resisting this assessment because she might have anticipated that the village of Norwood, through its assessing power as a municipality, conferred upon it by the two sections that I have cited, would undertake to employ the instrumentality of the section of the statute that authorized the village to get the purchase price of her land out of her, by making an assessment upon the remainder of her abutting land?

The case that counsel cites, Tone v. Columbus, 39 Ohio St., 281, is an authority directly against his contention.

Nowhere in this record does it appear that complainant petitioned for any street improvement—that she asked the village council to bring a condemnation proceeding and take her property—that she petitioned it to make a street in it after it had been taken, or that she solicited it to build a street upon it.

It was such acts that the Supreme Court of Ohio in Tone v. City of Columbus held might operate by way of estoppel in some assessment cases. But the court also says

that silence is not to be construed as an acquiescence in subsequent illegal acts, as every citizen has a right to assume that the subsequent acts of a council will be legal, and hence valid.

A portion of this strip had been used as a private driveway, as the husband of the complainant testified, record pages 25 and 26. But there is no pretense that the village of Norwood had ever acquired title by prescription, or that either it or the public had secured an easement in it as a highway of any kind.

And if it had, the beginning of an action by the village to condemn the strip of ground would have been an abandonment of any claim, either by way of a prescriptive title or a license to use by way of easement.

With all deference and respect to the municipality of Norwood and its able counsel, I submit the case would not be any different, if its council after the condemnation proceedings and after the payment of the money to complainant, knowing it to be in her house, had left the council chamber, gone to her dwelling, demanded of her that she give the money back to the town, and refusing to do so, had taken it from her.

Would the counsel contend that if a writ of injunction could have been obtained during the process of this sort of taking, that the council could have answered to the writ that the plaintiff was estopped from enjoining them from taking the money from her, because she might have expected when they condemned her property and paid her for it, that speedily they would have been at her dwelling house

attempting to take it away from her to pay it back into the municipal treasury?

I respectfully submit in conclusion that the judgment of the court below should be affirmed.

CHARLES W. BAKER,
For Appellee.

NORWOOD *v.* BAKER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

No. 34. Submitted May 3, 1898. — Decided December 12, 1898.

The principle underlying special assessments upon private property to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore that the owners do not in fact pay anything in excess of what they receive by reason of such improvement.

The exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation; but, unless such excess of cost over special benefits be of a material character, it ought not to be regarded by a court of equity, when its aid is invoked to restrain the enforcement of a special assessment.

Opinion of the Court.

The constitution of Ohio authorizes the taking of private property for the purpose of making public roads, but requires a compensation to be made therefor to the owner, to be assessed by a jury, without deduction for benefits. The statutes of the State, quoted or referred to in the opinion of the court, make provisions for the manner in which this power is to be exercised. In the case of the opening of a new road, they authorize a special assessment upon bounding and abutting property by the front foot for this entire cost and expense of the improvement, without taking special benefits into account. The alleged improvement in this case was the construction through property of the appellee of a street 300 feet in length and 50 feet in width, to connect two streets of that width running from each end in opposite directions. In the proceedings in this case the corporation of Norwood manifestly went upon the theory that the abutting property could be made to bear the whole cost of the new road, whether it was benefited or not to the extent of such cost, and the assessment was made accordingly. This suit was brought to obtain a decree restraining the corporation from enforcing the assessment against the plaintiff's abutting property, which decree was granted. *Held*, that the assessment was, in itself, an illegal one, because it rested upon a basis that excluded any consideration of benefits; that therefore a decree enjoining the whole assessment was the only appropriate decree; that it was not necessary to tender, as a condition of relief being granted to the plaintiff, any sum as representing what she supposed, or might guess, or was willing to concede was the excess of costs over any benefits accruing to the property; and that the legal effect of the decree was only to prevent the enforcement of the particular assessment in question, leaving the corporation free to take such steps as might be within its power, to make a new assessment upon the plaintiff's abutting property for so much of the expense of opening the street as might be found equal to the special benefits accruing to the property.

The case is stated in the opinion.

Mr. William E. Bundy for appellant.

Mr. Charles W. Baker for appellee.

Mr. Justice Harlan delivered the opinion of the court.

This case arises out of the condemnation of certain lands for the purpose of opening a street in the Village of Norwood, a municipal corporation in Hamilton County, Ohio.

The particular question presented for consideration involves the validity of an ordinance of that Village, assessing upon

the appellee's land abutting on each side of the new street an amount covering not simply a sum equal to that paid for the land taken for the street, but, in addition, the costs and expenses connected with the condemnation proceedings.

By the final decree of the Circuit Court of the United States it was adjudged that the assessment complained of was in violation of the Fourteenth Amendment of the Constitution of the United States forbidding any State from depriving a person of property without due process of law; and the Village was perpetually enjoined from enforcing the assessment. 74 Fed. Rep. 997.

The present appeal was prosecuted directly to this court, because the case involved the construction and application of the Constitution of the United States.

It will conduce to a clear understanding of the case to ascertain the powers of the Village under the constitution and statutes of Ohio, and to refer somewhat in detail to the proceedings instituted for the opening of the street through appellee's property.

By the constitution of Ohio it is declared: "Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money; . . . and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner." Const. Ohio, 1851, Art. 1, § 19, Bill of Rights; 3 Bates Anno. Ohio Stat. 3525.

Cities and villages in Ohio are by statute given power to lay off, establish, open, widen, narrow, straighten, extend, keep in order and repair, and light streets, alleys, public grounds and buildings, wharves, landing places, bridges and market spaces within the corporation, and to appropriate private property for the use of the corporation. And "each city and village may appropriate, enter upon, and hold real

estate within its corporate limits for the following purposes, but no more shall be taken or appropriated than is reasonably necessary for the purpose to which it is to be applied: 1. For opening, widening, straightening and extending streets, alleys and avenues; also for obtaining gravel or other material for the improvement of the same, and for this purpose the right to appropriate shall not be limited to lands lying within the limits of the corporation, . . ." 1 Rev. Stat. Ohio, (1890) § 1692, sub. div. 18 and 33, and § 2232, pp. 429, 430, Title, Cities and Villages; Enumeration of Powers, and p. 572, Title, Appropriation by Cities and Villages of Private Property to Public Use.

Other provisions of the statute prescribe the steps to be taken in the appropriation by a municipal corporation of private property for public purposes. §§ 2233 to 2261 inclusive.

It is further provided by the statutes of Ohio, (1890) Title XII, Assessments, etc., chap. 4, as follows:

"§ 2263. When the corporation appropriates, or otherwise acquires, lots or lands for the purpose of laying off, opening, extending, straightening or widening a street, alley or other public highway, or is possessed of property which it desires to improve for street purposes, the council may assess the cost and expenses of such appropriation or acquisition, and of the improvement, or of either, or of any part of either, upon the general tax list, in which case the same shall be assessed upon all the taxable real and personal property in the corporation.

"§ 2264. In the cases provided for in the last section, and in all cases where an improvement of any kind is made of an existing street, alley or other public highway, the council may decline to assess the costs and expenses in the last section mentioned or any part thereof, or the costs and expenses or any part thereof of such improvement, except as hereinafter mentioned, on the general tax list, in which event such costs and expenses, or any part thereof which may not be so assessed on the general tax list, shall be assessed by the council on the abutting and such adjacent and contiguous or other benefited lots and lands in the corporation, *either* in proportion to the benefits which may result from the improve-

ment, *or* according to the value of the property assessed, *or* by *the front foot of the property bounding and abutting upon the improvement*, as the council, by ordinance setting forth specifically the lots and lands to be assessed, may determine before the improvement is made, and in the manner and subject to the restrictions herein contained; and the assessments shall be payable in one or more instalments, and at such times as the council may prescribe. . . ." 1 Rev. Stat. Ohio, p. 581.

Section 2271 provides: "In cities of the first grade of the first class, and in corporations in counties containing a city of the first grade of the first class, the tax or assessment especially levied or assessed upon any lot or land for any improvement, shall not, except as provided in § 2272, exceed twenty-five per centum of the value of such lot or land after the improvement is made, and the cost exceeding that per centum shall be paid by the corporation out of its general revenue; . . . and whenever any street or avenue is opened, extended, straightened or widened, the special assessment for the cost and expense, or any part thereof, shall be assessed *only on the lots and lands bounding and abutting on such part or parts of said street or avenue* so improved, and shall include of such lots and lands only to a fair average depth of lots in the neighborhood, but shall also include other lots and parts thereof and lands to such depth; and whenever at least one half in width of any street or avenue has been dedicated for such purpose from the lots and lands lying on one side of the line of such street or avenue, and such street or avenue is widened by taking from lots and lands on the other side thereof, no part of the cost and expense thus increased [incurred] shall be assessed upon the lots and lands lying on said first-mentioned side, but only upon the other side, and as aforesaid, but said special assessment shall not be in any case in excess of benefits." 1 Rev. Stat. Ohio, p. 586.

Section 2272 relates to assessments for improvements made in conformity with the petition of the owners of property.

By section 2277 it is provided that "in cases wherein it is determined to assess the whole or any part of the cost of an improvement upon the lot or lands bounding or abutting

upon the same, or upon other lots or lands benefited thereby, as provided in § 2264, the council may require the board of improvements, or board of public works, as the case may be, or may appoint three disinterested freeholders of the corporation or vicinity, to report to the council an estimated assessment of such cost on the lots or lands to be charged therewith, in proportion, as nearly as may be, to the benefits which may result from the improvement to the several lots or parcels of land so assessed, a copy of which assessment shall be filed in the office of the clerk of the corporation for public inspection."

Section 2284 is in these words: "The cost of any improvement contemplated in this chapter shall include the purchase money of real estate, or any interest therein, when the same has been acquired by purchase, or the value thereof as found by the jury, where the same has been appropriated, the costs and expenses of the proceedings, the damages assessed in favor of any owner of adjoining lands and interest thereon, the costs and expenses of the assessment, the expense of the preliminary and other surveys, and of printing, publishing the notices and ordinances required, including notice of assessment, and serving notices on property owners, the cost of construction, interest on bonds where bonds have been issued in anticipation of the collection of assessments, and any other necessary expenditure."

By an ordinance approved October 19, 1891, the Village declared its intention to condemn and appropriate, and by that ordinance condemned and appropriated, the lands or grounds in question for the purpose of opening and extending Ivenhoe Avenue: and in order to make such appropriation effectual, the ordinance directed the institution of the necessary proceedings in court for an inquiry and assessment of the compensation to be paid for the property to be condemned.

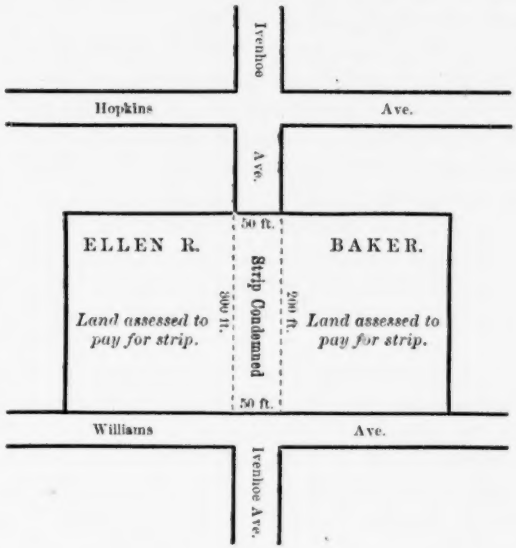
The ordinance provided that the cost and expense of the condemnation of the property, including the compensation paid to the owners, the cost of the condemnation proceedings, the cost of advertising and all other costs and the interest on bonds issued, if any, should be assessed "*per front foot* upon the property bounding and abutting on that part of Ivenhoe

Avenue, as condemned and appropriated herein" — the assessments payable in ten annual instalments if deferred, and the same collected as prescribed by law and in the assessing ordinance thereafter to be passed.

Under that ordinance, application was made by the Village to the probate court of Hamilton County for the empanelling of a jury to assess the compensation to be paid for the property to be taken. A jury was accordingly empanelled, and it assessed the plaintiff's compensation at $2000, declaring that they made the "assessment irrespective of any benefit to the owner from any improvement proposed by said corporation."

The assessment was confirmed by the court, the amount assessed was paid to the owner, and it was ordered that the Village have immediate possession and ownership of the premises for the uses and purposes specified in the ordinance.

The property condemned is indicated by the following plat:



After the finding of the jury the Village council passed an ordinance levying and assessing "*on each front foot* of the several lots of land bounding and abutting on Ivenhoe Avenue, from Williams Avenue to a point 300 feet north," certain sums for each of the years 1892 to 1901 inclusive, "to pay the cost and expense of condemning property for the extension of said Ivenhoe Avenue between the points aforesaid [from Williams Avenue to a point 300 feet north], together with the interest on the bonds issued to provide a fund to pay for said condemnation."

By the same ordinance provision was made for issuing bonds to provide for the payment of the cost and expense of the condemnation, which included the amount found by the jury as compensation for the property taken, the costs in the condemnation proceedings, solicitor and expert witness fees, advertising, etc.; in all, $2218.58.

The present suit was brought to obtain a decree restraining the Village from enforcing the assessment in question against the abutting property of the plaintiff.

It was conceded that the defendant assessed back upon the plaintiff's 300 feet of land upon either side of the strip taken (making 600 feet in all of frontage upon the strip condemned) the above sum of $2218.58, payable in instalments, with interest at six per cent, the first instalment being $354.97 and the last or tenth instalment $235.17, lessening the same from year to year in an amount of about $13 per annum; and the Village admitted that the assessment had been placed upon the tax duplicate, and sent to the county treasurer for collection, *as a lien and charge against the abutting property* owned by the plaintiff.

But the Village alleged that the appropriation proceedings and consequent assessment were all in strict conformity with the laws and statutes of the State of Ohio and in pursuance of due process of law; that the opening and extension of Ivenhoe Avenue constituted a public improvement for which the abutting property was liable to assessment under the laws of Ohio; that the counsel fees, witness fees and costs included in such total assessment were a part of the legitimate ex-

penses of such improvement; and that in any event an expense had been incurred by the municipal corporation in opening the street "equal to the full amount of the said assessment, which is a proper charge against the complainant's abutting property."

It was agreed at the hearing of the present case that the sum awarded by the verdict of the jury was paid to and received by the plaintiff, and that it was that sum, together with the costs and charges, that the Village undertook to assess back upon the land upon either side of said strip of land.

The plaintiff's suit proceeded upon the ground, distinctly stated, that the assessment in question was in violation of the Fourteenth Amendment providing that no State shall deprive any person of property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws, as well as of the Bill of Rights of the Constitution of Ohio.

It has been adjudged that the due process of law prescribed by that Amendment requires compensation to be made or secured to the owner when private property is taken by a State or under its authority for public use. *Chicago, Burlington &c. Railroad* v. *Chicago*, 166 U. S. 226, 241; *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, 695.

The taking of the plaintiff's land for the street was under the power of eminent domain — a power which this court has said was the offspring of political necessity, and inseparable from sovereignty unless denied to it by the fundamental law. *Searl* v. *Lake County School District*, 133 U. S. 553. But the assessment of the abutting property for the cost and expense incurred by the Village was an exercise of the power of taxation. Except for the provision of the constitution of Ohio above quoted, the State could have authorized benefits to be deducted from the actual value of the land taken, without violating the constitutional injunction that compensation be made for private property taken for public use; for the benefits received could be properly regarded as compensation *pro tanto* for the property appropriated to public use. But

does the exclusion of benefits from the estimate of compensation to be made for the property actually taken for public use authorize the public to charge upon the abutting property the sum paid for it, together with the entire costs incurred in the condemnation proceedings, irrespective of the question whether the property was benefited by the opening of the street?

Undoubtedly abutting owners may be subjected to special assessments to meet the expenses of opening public highways in front of their property — such assessments, according to well-established principles, resting upon the ground that special burdens may be imposed for special or peculiar benefits accruing from public improvements. *Mobile County* v. *Kimball*, 102 U. S. 691, 703, 704; *Illinois Central Railroad* v. *Decatur*, 147 U. S. 190, 202; *Bauman* v. *Ross*, 167 U. S. 548, 589, and authorities there cited. And according to the weight of judicial authority, the legislature has a large discretion in defining the territory to be deemed specially benefited by a public improvement, and which may be subjected to special assessment to meet the cost of such improvements. In *Williams* v. *Eggleston*, 170 U. S. 304, 311, where the only question, as this court stated, was as to the power of the legislature to cast the burden of a public improvement upon certain towns, which had been judicially determined to be towns benefited by such improvement, it was said: "Neither can it be doubted that, if the state constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district and what property shall be considered as benefited by a proposed improvement."

But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of

what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law, that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country. It is one thing for the legislature to prescribe it as a *general* rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is made or is about to be made, that the sum so fixed is in excess of the benefits received.

In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation. We say "substantial excess," because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment.

In *Illinois Central Railroad* v. *Decatur*, 147 U. S. 190, 202, — where it was held that a provision in the charter of a railroad company exempting it from taxation did not exempt it from a municipal assessment imposed upon its land for grading and paving a street, — the decision rested upon the ground that a special assessment proceeds on the theory that the property charged therewith derives an increased value from the improvement, "the enhancement in value being the consideration for the charge."

In Cooley on Taxation, (2d ed. c. xx,) the author, in considering the subject of taxation by special assessment, and of estimating benefits conferred upon property by a public improvement, says that, while a general levy of taxes rests upon the ground that the citizen may be required to make contribution in that mode in return for the general benefits of government, special assessments are a peculiar species of taxation, and are made upon the assumption that "a portion of the community is to be specially and peculiarly benefited, in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds; and, in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the persons receiving it. The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby; their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay." Again, the author says: "There can be no justification for any proceeding which charges the land with an assessment greater than the benefits; it is a plain case of appropriating private property to public uses without compensation."

In *Macon* v. *Patty*, 57 Mississippi, 378, 386, the Supreme Court of Mississippi said that a special assessment is unlike an ordinary tax, in that the proceeds of the assessment must be expended in an improvement from which "a benefit clearly exceptive and plainly perceived must inure to the property upon which it is imposed."

So, *In the Matter of Canal Street*, 11 Wend. 154, 155, 156, which related to an assessment to meet the expenses of opening a street, the court, after observing that the principle that private property shall not be taken for public use without just compensation was found in the constitution and the laws of the State, and had its foundation in those elementary principles of equity and justice which lie at the root of the social compact, said: "The corporation may see the extent of the

benefit of any improvement, before proceedings are commenced; but the extent of injury to be done to individuals cannot be known to them until the coming in of the report of the commissioners; they may then be satisfied that the property which is to be benefited will not be benefited to the extent of the assessment necessary to indemnify those whose property is taken from them. What are they to do? If they proceed, they deprive some persons of their property unjustly; if the report of the commissioners is correct, the amount awarded to the owners of property taken cannot be reduced without injustice to them. If the assessment is confirmed and enforced, the owners of the adjacent property must pay beyond the enhanced value of their own property, and all such excess is private property taken for public use without just compensation."

In *McCormack* v. *Patchin*, 53 Missouri, 33, 36, the Supreme Court of Missouri said: "The whole theory of local taxation or assessments is that the improvements for which they are levied afford a remuneration in the way of benefits. A law which would attempt to make one person, or a given number of persons, under the guise of local assessments, pay a general revenue for the public at large, would not be an exercise of the taxing power, but an act of confiscation." See also *Zoeller* v. *Kellogg*, 4 Mo. App. 163.

In *State &c.* v. *Hoboken*, 36 N. J. L. 291, 293, which was the case of the improvement of a street and a special assessment to meet the cost, — such cost being in excess of the benefits received by the property owner, — it was held that to the extent of such excess private property was taken for public use without compensation, because that received by the landowner was not equal to that taken from him.

It will not escape observation that if the entire cost incurred by a municipal corporation in condemning land for the purpose of opening or extending a street can be assessed back upon the abutting property, without inquiry in any form as to the special benefits received by the owner, the result will be more injurious to the owner than if he had been required, in the first instance, to open the street at his own cost, without

compensation in respect of the land taken for the street; for, by opening the street at his own cost, he might save at least the expense attending formal proceedings of condemnation. It cannot be that any such result is consistent with the principles upon which rests the power to make special assessments upon property in order to meet the expense of public improvements in the vicinity of such property.

The views we have expressed are supported by other adjudged cases, as well as by reason and by the principles which must be recognized as essential for the protection of private property against the arbitrary action of government. The importance of the question before us renders it appropriate to refer to some of those cases.

In *State* v. *Newark*, 37 N. J. L. 415, 416, 420–423, the question arose as to the validity of an assessment of the expenses incurred in repairing the roadbed of a portion of one of the streets of the city of Newark. The assessment was made in conformity to a statute that undertook to fix, at the mere will of the legislature, the ratio of expense to be put upon the owners of property along the line of the improvement. Chief Justice Beasley, speaking for the Court of Errors and Appeals, said: "The doctrine that it is competent for the legislature to direct the expense of opening, paving or improving a public street, or at least some part of such expense, to be put as a special burthen on the property in the neighborhood of such improvement, cannot, at this day, be drawn in question. There is nothing in the constitution of this State that requires that all property in the State, or in any particular subdivision of the State, must be embraced in the operation of every law levying a tax. That the effect of such laws may not extend beyond certain prescribed limits, is perfectly indisputable. It is upon this principle that taxes raised in counties, townships and cities are vindicated. But while it is thus clear that the burthen of a particular tax may be placed on any political district to whose benefit such tax is to enure, it seems to me it is equally clear that, when such burthen is sought to be imposed on particular lands, not in themselves constituting a political subdivision of the State, we at once approach the

line which is the boundary between acts of taxation and acts of confiscation. I think it impossible to assert, with the least show of reason, that the legislative right to select the subject of taxation is not a limited right. For it would seem much more in accordance with correct theory to maintain that the power of selection of the property to be taxed cannot be contracted to a narrower bound than the political district within which it is to operate, than that such power is entirely illimitable. If such prerogative has no trammel or circumscription, then it follows that the entire burthen of one of these public improvements can be placed, by the force of the legislative will, on the property of a few enumerated citizens, or even on that of a single citizen. In a government in which the legislative power is not omnipotent, and in which it is a fundamental axiom that private property cannot be taken without just compensation, the existence of an unlimited right in the lawmaking power to concentrate the burthen of a tax upon specified property, does not exist. If a statute should direct a certain street in a city to be paved, and the expense of such paving to be assessed on the houses standing at the four corners of such street, this would not be an act of taxation, and it is presumed that no one would assert it to be such. If this cannot be maintained, then it follows that it is conceded that the legislative power in question is not completely arbitrary. It has its limit; and the only inquiry is, where that limit is to be placed."

After referring to a former decision of the same court, in which it was said that special assessments could be sustained upon the theory that the party assessed was locally and peculiarly benefited above the ordinary benefit which as one of the community he received in all public improvements, the opinion proceeds: "It follows, then, that these local assessments are justifiable on the ground above, that the locality is especially to be benefited by the outlay of the money to be raised. Unless this is the case no reason can be assigned why the tax is not general. An assessment laid on property along a city street for an improvement made in another street, in a distant part of the same city, would be universally condemned,

both on moral and legal grounds. And yet there is no difference between such an extortion and the requisition upon a landowner to pay for a public improvement over and above the exceptive benefit received by him. It is true that the power of taxing is one of the high and indispensable prerogatives of the government, and it can be only in cases free from all doubt that its exercise can be declared by the courts to be illegal. But such a case, if it can ever arise, is certainly presented when a property is specified, out of which a public improvement is to be paid for in excess of the value specially imparted to it by such improvement. As to such excess I cannot distinguish an act exacting its payment from the exercise of the power of eminent domain. In case of taxation the citizen pays his quota of the common burthen; when his land is sequestered for the public use he contributes more than such quota, and this is the distinction between the effect of the exercise of the taxing power and that of eminent domain. When, then, the overplus beyond benefits from these local improvements is laid upon a few landowners, such citizens, with respect to such overplus, are required to defray more than their share of the public outlay, and the coercive act is not within the proper scope of the power to tax."

So, in *Bogert* v. *Elizabeth City*, 27 N. J. Eq. 568, 569, which involved the validity of a provision in the charter of a city directing the whole cost of special improvements to be put on the property on the line of the street opposite such improvements, the assessments to be made in a just and equitable manner by the common city council, the court said: "The sum of the expense is ordered to be put on certain designated property, without regard to the proportion of benefit it has received from the improvement. The direction is perfectly clear; the entire burthen is to be borne by the land along the line of the improvement, and the ratio of distribution among the respective lots is left to the judgment of the common council. Such a power, according to legal rules now at rest in this State, cannot be executed. The whole clause is nugatory and void, and all proceedings under it are not mere irregularities, but are nullities."

In *Hammett* v. *Philadelphia*, 65 Penn. St. 146, 151, 153, the court, speaking by Judge Sharswood, said that it was a point fully settled and at rest in that State, that the legislature has the constitutional right to confer upon municipal corporations the power of assessing the costs of local improvements upon the properties benefited, and that on the same principle the validity of municipal claims assessing on the lots fronting upon streets their due share of the cost of grading, curbing, paving, building sewers and culverts, and laying water pipes, in proportion to their respective fronts, has been repeatedly recognized, and the liens for such assessments enforced. "These cases," the court said, "all fall strictly within the rule as originally enunciated — local taxation for local purposes — or, as it has been elsewhere expressed, taxation on the benefits conferred, and *not beyond the extent of those benefits*. . . . If the sovereign breaks open the strong box of an individual or corporation and takes out money, or, if, not being paid on demand, he seizes and sells the lands or goods of the subject, it looks to me very much like a direct taking of private property for public use. It certainly cannot alter the case to call it taxation. Whenever a local assessment upon an individual is not grounded upon and *measured by, the extent of his particular benefit*, it is, *pro tanto*, a taking of his private property for public use without any provision for compensation."

In *Barnes* v. *Dyer*, 56 Vermont, 469, 471, which involved the validity of a statute relating to the construction and repair of sidewalks in a city of Vermont, under the authority of its common council, and directing the expense to be assessed on the owners of property through which or fronting which such sidewalks should be constructed, it was said: "The act in question made no express allusion to assessment on account of benefit; neither does it limit the assessment to the amount of benefit. Yet, as we have seen, the right to assess at all depends solely on benefit, and must be proportioned to and limited by it. An improvement might cost double the benefit to the land specially benefited."

In *Thomas* v. *Gain*, 35 Michigan, 155, 162, Chief Justice Cooley, speaking for the Supreme Court of Michigan, said:

"It is generally agreed that an assessment levied without regard to actual or probable benefits is unlawful, as constituting an attempt to appropriate private property to public uses. This idea is strongly stated in *Tide-Water Co.* v. *Coster*, 18 N. J. Eq. (3 C. E. Green) 519, which has often been cited with approval in other cases. It is admitted that the legislature may prescribe the rule for the apportionment of benefits, but it is not conceded that its power in this regard is unlimited. The rule must at least be one which it is legally possible may be just and equal as between the parties assessed; if it is not conceivable that the rule prescribed is one which will apportion the burthen justly, or with such proximate justice as is usually attainable in tax cases, it must fall to the ground, like any other merely arbitrary action which is supported by no principle."

In the case of *Tide-Water Co.* v. *Coster*, *supra*, 518, 527, 528, referred to by the Supreme Court of Michigan, it was said: "Where lands are improved by legislative action on the ground of public utility, the cost of such improvement, it has frequently been held, may, to a certain degree, be imposed on the parties who, in consequence of owning the lands in the vicinity of such improvement, receive a peculiar advantage. By the operation of such a system it is not considered that the property of the individual, or any part of it, is taken from him for the public use, because he is compensated in the enhanced value of such property. But it is clear this principle is only applicable when the benefit is commensurate to the burthen, when that which is received by the landowner is equal or superior in value to the sum exacted; for if the sum exacted be in excess, then *to that extent*, most incontestably, private property is assumed by the public. Nor, as to this excess, can it be successfully maintained that such imposition is legitimate, as an exercise of the power of taxation. Such an imposition has none of the essential characteristics of a tax. We are to bear in mind that this projected improvement is to be regarded as one in which the public has an interest. The owners of these lands have a special concern in such improvements so far as particular lands will be in a peculiar manner benefited.

Beyond this their situation is like the rest of the community. The consideration for the excess of the cost of improvement over the enhancement of the property within the operation of the act is the public benefit. The expenditure of this portion of the cost of the work can only be justified on the ground of benefit to the public. I am aware of no principle that will permit the expense incurred in conferring such benefit on the public to be laid in the form of a tax upon certain persons."

In Dillon's Treatise on Municipal Corporations there is an extended discussion of this whole subject. In section 761 he states the general results of the cases in the several States concerning special assessments for local improvements. After stating that a local assessment or tax upon the property benefited by a local improvement may be authorized by the legislature, he says: "Special benefits to the property assessed, that is, benefits received by it in addition to those received by the community at large, is the true and only just foundation upon which local assessments can rest; and *to the extent of special benefits* it is everywhere admitted that the legislature may authorize local taxes or assessments to be made." Again, the author says: "When not restrained by the constitution of the particular State, the legislature has a discretion, commensurate with the broad domain of legislative power, in making provisions for ascertaining what property is specially benefited and how the benefits shall be apportioned. This proposition, as stated, is nowhere denied. But the adjudged cases do not agree upon the extent of legislative power." While recognizing the fact that some courts have asserted that the authority of the legislature in this regard is quite without limits, the author observes that "the decided tendency of the later decisions, including those of the courts of New Jersey, Michigan and Pennsylvania, is to hold that the legislative power is not unlimited, and that these assessments must be apportioned by some rule capable of producing reasonable equality, and that provisions of such a nature as to make it legally impossible that the burden can be apportioned with proximate equality are arbitrary exactions and not an exercise of legislative authority." He further says:

"Whether it is competent for the legislature to declare that no part of the expense of a local improvement of a public nature shall be borne by a general tax, and that the whole of it shall be assessed upon the abutting property and other property in the vicinity of the improvement, thus for itself conclusively determining, not only that such property is specially benefited, but that it *is* thus benefited to the extent of the cost of the improvement, and then to provide for the apportionment of the amount by an estimate to be made by designated boards or officers, or by frontage or superficial area, is a question upon which the courts are not agreed. Almost all of the earlier cases asserted that the legislative discretion in the apportionment of public burdens extended this far, and such legislation is still upheld in most of the States. But since the period when express provisions have been made in many of the state constitutions requiring uniformity and equality of taxation, several courts of great respectability, either by force of this requirement or in the spirit of it, and perceiving that *special benefits actually received* by each parcel of contributing property, *was the only principle upon which such assessments can justly rest*, and that any other rule is unequal, oppressive and arbitrary, have denied the unlimited scope of legislative discretion and power, and asserted what must *upon principle be regarded as the just and reasonable doctrine*, that the cost of a local improvement can be assessed upon particular property *only to the extent that it is specially and peculiarly benefited; and since the excess beyond that is a benefit to the municipality at large, it must be borne by the general treasury.*"

It is said that the judgment below is not in accord with the decision of the Supreme Court of Ohio in *Cleveland City* v. *Wick*, 18 Ohio St. 303, 310. But that is a mistake. That case only decided that the owner whose property was taken for a public improvement could not have his abutting property exempt from its due proportion of an assessment made to cover the expense incurred in making such improvement; that his liability in that regard was not affected by the fact that he was entitled to receive compensation for his property actually

taken for the improvement without deduction on account of benefits to his other property. That the decision covered no other point is shown by the following extract from the opinion of the court: "The mischief which existed under the old constitution was, that the benefits which were common to his neighbors, without charge, were deducted from the price paid to the owner of land taken. The evil might well be denominated inequality of benefits and burdens among adjoining landowners. You paid for the owner's land in privileges, and left him still liable, equally with his neighbors whose lands were untaken, to any and all local assessments that might afterwards be imposed. This was unequal, and therefore deemed unjust. Experience proved, moreover, that it led to much abuse of the power of condemnation. A full remedy is to be found for these evils in the provision in question, without at all making it to interfere with the power of assessment. Construed thus, it is in perfect accordance with the leading principle of taxation in the new constitution — uniformity and equality of burdens. It simply guarantees to the owner of land condemned a full price. When that is paid, he stands on a perfect equality with all other owners of adjoining lands, equally liable, as he ought to be, to be taxed upon his other lands with them. He has the full price of his land in his pocket, and is an equal participant with them in benefits to adjoining lands. To throw the whole burden upon the others, in such a case, would be to do them the precise injustice which was done to him under the old constitution. To do so, would be to avoid one evil only to run into another. It would be to avoid the evil of withholding from him a full and fair price for his lands, only to run into the equal evil of paying him two prices for it, the second price being at the expense of his neighbors."

If the principles announced by the authorities above cited be applied to the present case, the result must be an affirmance of the judgment.

We have seen that, by the Revised Statutes of Ohio relating to assessments, the Village of Norwood was authorized to place the cost and expense attending the condemnation of the plaintiff's land for a public street on the general tax list of the

corporation, section 2263; but if the Village declined to adopt that course, it was required by section 2264 to assess such cost and expense "on the abutting and such adjacent and contiguous or other benefited lots and lands in the corporation, *either* in proportion to the benefits which may result from the improvement *or* according to the value of the property assessed, *or* by *the front foot* of the property bounding and abutting upon the improvement;" while by section 2271, whenever any street or avenue was opened, extended, straightened or widened, the special assessment for the cost and expense, or any part thereof, "shall be assessed only on the lots and lands bounding and abutting on such part or parts of said street or avenue so improved, and shall include of such lots and lands only to a fair average depth of lots in the neighborhood." It thus appears that the statute authorizes a special assessment upon the bounding and abutting property by the front foot for the entire cost and expense of the improvement, without taking special benefits into account. And that was the method pursued by the Village of Norwood. The corporation manifestly proceeded upon the theory that the abutting property could be made to bear the whole cost of the improvement, whether such property was benefited or not to the extent of such cost.

It is said that a court of equity ought not to interpose to prevent the enforcement of the assessment in question, because the plaintiff did not show nor offer to show by proof that the amount assessed upon her property was in excess of the special benefits accruing to it by reason of the opening of the street. This suggestion implies that if the proof had showed an excess of cost incurred in opening the street over the special benefits accruing to the abutting property, a decree might properly have been made enjoining the assessment to the extent simply that such cost exceeded the benefits. We do not concur in this view. As the pleadings show, the Village proceeded upon the theory, justified by the words of the statute, that the entire cost incurred in opening the street, including the value of the property appropriated, could, when the assessment was by the front foot, be put upon the

abutting property, irrespective of special benefits. The assessment was by the front foot and for a specific sum representing such cost, and that sum could not have been reduced under the ordinance of the Village even if proof had been made that the costs and expenses assessed upon the abutting property exceeded the special benefits. The assessment was in itself an illegal one because it rested upon a basis that excluded any consideration of benefits. A decree enjoining the whole assessment was therefore the only appropriate one.

Nor is the present case controlled by the general principle announced in many cases that a court of equity will not relieve a party against an assessment for taxation unless he tenders or offers to pay what he admits or what is seen to be due. That rule is thus stated in *National Bank* v. *Kimball*, 103 U. S. 732, 733: "We have announced more than once that it is the established rule of this court that no one can be permitted to go into a court of equity to enjoin the collection of a tax, until he has shown himself entitled to the aid of the court by paying so much of the tax assessed against him as it can be *plainly seen he ought to pay;* that he shall not be permitted, because his tax is in excess of what is just and lawful, to screen himself from paying any tax at all until the precise amount which he ought to pay is ascertained by a court of equity; and that the owner of property liable to taxation is bound to contribute his lawful share to the current expenses of government, and cannot throw that share on others while he engages in an expensive and protracted litigation to ascertain that the amount which he is assessed is or is not a few dollars more than it ought to be. But that before he asks this exact and scrupulous justice, he must first do equity by paying so much as it is *clear he ought to pay*, and contest and delay only the remainder. *State Railroad Tax cases*, 92 U. S. 575." The same principle was announced in *Northern Pacific Railroad* v. *Clark*, 153 U. S. 252, 272.

In *Cummings* v. *National Bank*, 101 U. S. 153, 157, which was the case of an injunction against the enforcement in Ohio of an illegal assessment upon the shares of stock of a national bank, this court, after observing that the bank held a trust

relation that authorized a court of equity to see that it was protected in the exercise of the duties appertaining to it, said: "But the statute of the State expressly declares that suits may be brought to enjoin the illegal levy of taxes and assessments, or the collection of them. § 5848 of the Revised Statutes of Ohio, 1880; vol. liii, Laws of Ohio, 178, §§ 1, 2. And though we have repeatedly decided in this court that the statute of a State cannot control the mode of procedure in equity cases in Federal courts, nor deprive them of their separate equity jurisdiction, we have also held that, where a statute of a State created a new right or provided a new remedy, the Federal courts will enforce that right either on the common law or equity side of its docket, as the nature of the new right or new remedy requires. *Van Norden* v. *Morton*, 99 U. S. 378. Here there can be no doubt that the remedy by injunction against an illegal tax, expressly granted by the statute, is to be enforced, and can only be appropriately enforced, on the equity side of the court." Again: "Independently of this statute, however, we are of opinion that when a *rule* or *system of valuation* is adopted by those whose duty it is to make the assessment, which is designed to operate unequally and to violate a fundamental principle of the constitution, and when this rule is applied not solely to one individual, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power." These observations are pertinent to the question of the power and duty of a court of equity to interfere for the plaintiff's relief. The present case is one of illegal assessment under a *rule or system* which, as we have stated, violated the constitution, in that the entire cost of the street improvement was imposed upon the abutting property, by the front foot, without any reference to special benefits.

Mr. High, in his Treatise on Injunctions, says that no principle is more firmly established than that requiring a taxpayer, who seeks the aid of an injunction against the enforcement or collection of a tax, first to pay or tender the amount which is conceded to be legally and properly due, or which is

plainly seen to be due. But he also says: "It is held, however, that the general rule requiring payment or tender of the amount actually due as a condition to equitable relief against the illegal portion of the tax, has no application to a case where the entire tax fails by reason of an illegal assessment. And in such case an injunction is proper without payment or tender of any portion of the tax, since it is impossible for the court to determine what portion is actually due, there being no valid or legal tax assessed."

The present case is not one in which — as in most of the cases brought to enjoin the collection of taxes or the enforcement of special assessments — it can be plainly or clearly seen, from the showing made by the pleadings, that a particular amount, if no more, is due from the plaintiff, and which amount should be paid or tendered before equity would interfere. It is rather a case in which the entire assessment is illegal. In such a case it was not necessary to tender, as a condition of relief being granted to the plaintiff, any sum as representing what she supposed, or might guess, or was willing to concede, was the excess of cost over any benefits accruing to the property. She was entitled, without making such a tender, to ask a court of equity to enjoin the enforcement of a *rule* of assessment that infringed upon her constitutional rights. In our judgment the Circuit Court properly enjoined the enforcement of the assessment as it was, without going into proofs as to the excess of the cost of opening the street over special benefits.

It should be observed that the decree did not relieve the abutting property from liability for such amount as could be properly assessed against it. Its legal effect, as we now adjudge, was only to prevent the enforcement of the particular assessment in question. It left the Village, in its discretion, to take such steps as were within its power to take, either under existing statutes, or under any authority that might thereafter be conferred upon it, to make a new assessment upon the plaintiff's abutting property for so much of the expense of opening the street as was found upon due and proper inquiry to be equal to the special benefits accruing to

the property. By the decree rendered the court avoided the performance of functions appertaining to an assessing tribunal or body, and left the subject under the control of the local authorities designated by the State. Such a decree was more appropriate than one enjoining the assessment to such extent as, in the judgment of the Circuit Court, the cost of the improvement exceeded the special benefits. The decree does not prevent the Village, if it has or obtains power to that end, from proceeding to make an assessment in conformity with the view indicated in this opinion, namely: That while abutting property may be specially assessed on account of the expense attending the opening of a public street in front of it, such assessment must be measured or limited by the special benefits accruing to it, that is, by benefits that are not shared by the general public; and that taxation of the abutting property for any substantial excess of such expense over special benefits will, to the extent of such excess, be a taking of private property for public use without compensation.

It has been suggested that what has been said by us is not consistent with our decision in *Parsons* v. *District of Columbia*, 170 U. S. 45, 52, 56. But this is an error. That was the case of a special assessment against land in the District of Columbia, belonging to the plaintiff Parsons, as a water main tax, or assessment for laying a water main in the street on which the land abutted. The work was done under the authority of an act of Congress establishing a *comprehensive system for the District*, and regulating the supply of water and the erection and maintenance of reservoirs and water mains. This court decided that "it was competent for Congress to create a *general system* to store water and furnish it to the inhabitants of the District, and to prescribe the amount of the assessment and the method of its collection; and that the plaintiff in error cannot be heard to complain that he was not notified of the creation of such a system or consulted as to the probable cost thereof. He is presumed to have notice of these general laws regulating such matters. The power conferred upon the commissioners was, not to make assessments upon abutting properties, nor to give notice to the prop-

erty owners of such assessments, but to determine the question of the propriety and necessity of laying water mains and water pipes, and of erecting fire plugs and hydrants, and their *bona fide* exercise of such power cannot be reviewed by the courts." One of the points in the case was presented by the contention that "the assessment exceeded the actual cost of the work." But that objection, the court said, overlooked "the fact that the laying of this main was part of the *water system*, and that the assessment prescribed was not merely to put down the pipes, *but to raise a fund to keep the system in efficient repair.* The moneys raised beyond the expense of laying the pipe are not paid into the general treasury of the District, but are set aside to maintain and repair the system; and there is no such *disproportion between the amount assessed and the actual cost as to show any abuse of legislative power.* A similar objection was disposed of by the Supreme Judicial Court of Massachusetts in the case of *Leominster* v. *Conant*, 139 Mass. 384. In that case the validity of an assessment for a sewer was denied because the amount of the assessment exceeded the cost of the sewer; but the court held that the legislation in question had created a sewer system, and that it was lawful to make assessments by a uniform rate which had been determined upon for the sewerage territory." If the cost of laying the water mains in question in that case had exceeded the value of the property specially assessed, or had been in excess of any benefits received by that property, a different question would have been presented.

Nor do we think that the present case is necessarily controlled by the decision in *Spencer* v. *Merchant*, 125 U. S. 345, 351, 357. That case came here upon writ of error to the highest court of New York. It related to an assessment, by legislative enactment, upon certain isolated parcels of land, of a named aggregate amount which remained unpaid of the cost of a street improvement. In reference to the statute, the validity of which was questioned, the court said: "By the statute of 1881 a sum equal to so much of the original assessment as remained unpaid, adding a proportional part of the expenses of making that assessment, and interest since, was

ordered by the legislature to be levied and equitably apportioned by the supervisors of the county upon and among these lots, after public notice to all parties interested to appear and be heard upon the question of such apportionment; and that sum was levied and assessed accordingly upon these lots, one of which was owned by the plaintiff. The question submitted to the Supreme Court of the State was whether this assessment on the plaintiff's lot was valid. He contended that the statute of 1881 was unconstitutional and void, because it was an attempt by the legislature to validate a void assessment, without giving the owners of the lands assessed an opportunity to be heard upon the whole amount of the assessment." Again: "The statute of 1881 afforded to the owners notice and hearing upon the question of the equitable apportionment among them of the sum directed to be levied upon all of them, and thus enabled them to contest the constitutionality of the statute; and that was all the notice and hearing to which they were entitled." The point raised in that case — the only point in judgment — was one relating to proper notice to the owners of the property assessed, in order that they might be heard upon the question of the equitable apportionment of the sum directed to be levied upon all of them. This appears from both the opinion and the dissenting opinion in that case.

We have considered the question presented for our determination with reference only to the provisions of the National Constitution. But we are also of opinion that, under any view of that question different from the one taken in this opinion, the requirement of the constitution of Ohio that compensation be made for private property taken for public use, and that such compensation must be assessed "without deduction for benefits to any property of the owner," would be of little practical value if, upon the opening of a public street through private property, the abutting property of the owner, whose land was taken for the street, can, under legislative authority, be assessed not only for such amount as will be equal to the benefits received, but for such additional amount as will meet the excess of expense over benefits.

Dissenting Opinion: Brewer, J.

The judgment of the Circuit Court must be affirmed, upon the ground that the assessment against the plaintiff's abutting property was under a rule which excluded any inquiry as to special benefits, and the necessary operation of which was, to the extent of the excess of the cost of opening the street in question over any special benefits accruing to the abutting property therefrom, to take private property for public use without compensation; and it is so ordered.

MR. JUSTICE BREWER dissenting.

I dissent from the opinion and judgment of the court in this case and for these reasons:

First. The taking of land for a highway or other public uses is a public improvement, the cost of which, under the constitution of Ohio, may be charged against the property benefited. *Cleveland* v. *Wick*, 18 Ohio St. 304.

Second. Equally true is this under the Constitution of the United States. *Shoemaker* v. *United States*, 147 U. S. 282, 302; *Bauman* v. *Ross*, 167 U. S. 548.

Third. The cost of this improvement was settled in judicial proceedings to which the defendant in error was a party, and having received the amount of the award she is estopped to deny that the cost was properly ascertained.

Fourth. A public improvement having been made, it is, beyond question, a legislative function, (and a common council duly authorized, as in this case, has legislative powers,) to determine the area benefited by such improvements, and the legislative determination is conclusive. *Spencer* v. *Merchant*, 100 N. Y. 585, in which the court said:

"The act of 1881 determines absolutely and conclusively the amount of the tax to be raised, and the property to be assessed, and upon which it is to be apportioned. Each of these things was within the power of the legislature, whose action cannot be reviewed in the courts upon the ground that it acted unjustly or without appropriate and adequate reasons. . . . By the act of 1881, the legislature imposes the unpaid portion of the cost and expense, with the interest thereon, upon that portion of the property benefited which has thus far borne

none of the burden. In so doing, it necessarily determines two things, viz., the amount to be realized, and the property specially benefited by the expenditure of that amount. The lands might have been benefited by the improvement, and so the legislative determination that they were, and to what amount or proportion of the cost, even if it may have been mistakenly unjust, is not open to our review. The question of special benefit and the property to which it extends is of necessity a question of fact, and when the legislature determines it in a case within its general power, its decision must of course be final."

Same Case, 125 U. S. 345, 355, in which the judgment of the Court of Appeals of the State of New York was affirmed, and in which this court said: "The legislature, in the exercise of its power of taxation, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading or repairing of a street, to be assessed upon the owners of lands benefited thereby; and the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion. *Willard* v. *Presbury*, 14 Wall. 676; *Davidson* v. *New Orleans*, 96 U. S. 97; *Mobile County* v. *Kimball*, 102 U. S. 691, 703, 704; *Hagar* v. *Reclamation District*, 111 U. S. 701."

Williams v. *Eggleston*, 170 U. S. 304, 311, in which this court declared: "Neither can it be doubted that, if the state constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district and what property shall be considered as benefited by a proposed improvement."

Parsons v. *District of Columbia*, 170 U. S. 45, in which this court sustained an act of Congress in respect to the District of Columbia, not only determining the area benefited by a public improvement, to wit, the ground fronting on the street in which the improvement was made, but also assessing the cost of such improvement at a specified rate, to wit, $1.25 per front foot on such area.

In this case we quoted approvingly from Dillon's Municipal

Corporations, 4th edition, volume 2, section 752, in reference to this matter of assessment, (p. 56): "Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting property or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency."

In the case at bar the question of apportionment is not important because the party charged owned all of the land within the area described, all of the land abutting upon the improvement. The rule would be the same if one hundred different lots belonging to as many different parties faced on the new street.

The legislative act charging the entire cost of an improvement upon certain described property is a legislative determination that the property described constitutes the area benefited, and also that it is benefited to the extent of such cost. It is unnecessary to inquire how far courts might be justified in interfering in a case in which it appeared that the legislature had attempted to cast the burden of a public improvement on property remote therefrom and obviously in no way benefited thereby, for here the property charged with the burden of the improvement is that abutting upon such improvement, the property *prima facie* benefited thereby, and the authorities which I have cited declare that it is within the legislative power to determine the area of the property benefited and the extent to which it is benefited. It seems to me strange to suggest that an act of the legislature or an ordinance of a city casting, for instance, the cost of a sewer, or sidewalk in a street, upon all the abutting property, is invalid unless it provides for a judicial inquiry whether such abutting property is in fact benefited, and to the full cost of the improvement, or whether other property might not also be to some degree benefited, and therefore chargeable with part of the cost.

Again, it is a maxim in equity that he who seeks equity must do equity, and as applied to proceedings to restrain the collection of taxes, that the party invoking the aid of a court of equity must allege and prove payment, or an offer to pay such portion of the taxes or assessment as is properly chargeable upon the property. This proposition has been iterated and reiterated in many cases. In *State Railroad Tax cases*, 92 U. S. 575, 617, it was laid down "as a rule to govern the courts of the United States in their action in such cases." Further, the mere fact that tax proceedings are illegal has never been held sufficient to justify relief in equity. These propositions have been uniformly and consistently followed. See among late cases *Northern Pacific Railroad* v. *Clark*, 153 U. S. 252, 272. There is nothing in *Cummings* v. *National Bank*, 101 U. S. 153, 163, in conflict with the foregoing propositions. In that case it appeared that the local assessors of Lucas County, in which the bank was situated, agreed upon a rule of assessment by which money or invested capital was assessed at six tenths of its value, while the shares of national banks were assessed at their full cash value. It was held that an unequal rule of assessment having been adopted by the assessors, and that rule "applied not solely to one individual, but to a large class of individuals or corporations," equity might properly interfere. But in that case the bank had paid to the county treasurer the tax which it ought to have paid, as shown by the closing words of the opinion of the court: "The complainant having paid to the defendant, or into the Circuit Court for his use, the tax which was its true share of the public burden, the decree of the Circuit Court enjoining the collection of the remainder is affirmed." If that creates an exception to the general equity rules in respect to tax proceedings, I am unable to perceive it.

Here the plaintiff does not allege that her property was not benefited by the improvement and to the amount of the full cost thereof; does not allege any payment or offer to pay the amount properly to be charged upon it for the benefits received, or even express a willingness to pay what the courts shall determine ought to be paid. On the contrary,

so far as the record discloses, either by the bill or her testimony, her property may have been enhanced in value ten times the cost of the condemnation. Neither is it charged that any other property was benefited in the slightest degree. It is well to quote all that is said in the bill in this respect:

"Your complainant complains of the defendant corporation that the said corporation, through its officers, its council, clerk and mayor, undertook and has undertaken to assess back upon this plaintiff's 300 feet upon either side of the said strip so taken, not only the said two thousand dollars, the amount adjudged to this plaintiff as the value of her property so taken, but also counsel fees, expenses of the suit, expenses and fees of expert witnesses, and other costs, fees and expenses to this complainant unknown, and has proceeded to assess for opening and extending the said Ivenhoe street or avenue for the 300 feet upon each side upon her premises, making 600 feet in all of frontage upon the said strip so condemned by the defendant corporation, the sum of $2218.58, payable in instalments, with interest at six per cent, the first instalment being $354.97 and the last or tenth instalment $235.17, lessening the same from year to year in an amount of about $13 per annum.

"That is to say, the said defendant corporation has undertaken to take 300 by 50 feet of this complainant's property, and, fixing the valuation upon it by proceedings at law, now undertakes to assess upon the complainant's adjacent property, 300 feet upon each side, the said $2000, the value of the same as adjudged by the court in the said condemnation proceedings, with all of the costs incidental thereto, including counsel and witness fees, so that in effect the property of this complainant has been taken and is sought to be taken by the defendant corporation for the uses of itself and the general public without any compensation in fact to the complainant therefor, but at an actual expense and outlay in addition — that is to say, the corporation purposes by assessment to make this complainant not only pay for her own property taken for the benefit of the defendant, but also to pay the costs of so taking it without compensation.

"Wherefore she invokes her remedy given her by statute by injunction. She avers that the said seizure and taking of her said property and the pretended condemnation of the same and assessment of the same with added costs back upon her own property for the benefit of the defendant corporation and the general public is a seizure of her property without compensation; not only that, but at costs to her besides, in that the defendants have undertaken to make her pay for the taking of her property without a compensation in addition to the value of the property, and that she is without remedy and powerless unless she may have and invoke the equitable interference, as the statute authorizes her, of this honorable court."

The testimony is equally silent as to the matter of damages and benefits. There is not only no averment, but not even a suggestion, that any other property than that abutting on the proposed improvement, and belonging to plaintiff, is in the slightest degree benefited thereby. Nor is there an averment or a suggestion that her property, thus improved by the opening of a street, has not been raised in value far above the cost of improvement. So that a legislative act charging the cost of an improvement in laying out a street, (and the same rule obtains if it was the grading, macadamizing or paving the street,) upon the property abutting thereon, is adjudged not only not conclusive that such abutting property is benefited to the full cost thereof, but further, that it is not even *prima facie* evidence thereof, and that before such an assessment can be sustained it must be shown, not simply that the legislative body has fixed the area of the taxing district, but also that, by suitable judicial inquiry, it has been established that such taxing district is benefited to the full amount of the cost of the improvement, and also that no other property is likewise benefited. The suggestion that such an assessment be declared void because the rule of assessment is erroneous, implies that it is *prima facie* erroneous to cast upon property abutting upon an improvement the cost thereof; that a legislative act casting upon such abutting property the full cost of an improvement, is *prima facie* void;

that, being *prima facie* void, the owner of any property so abutting on the improvement may obtain a decree of a court of equity cancelling *in toto* the assessment without denying that his property is benefited by the improvement, or paying, or offering to pay, or expressing a willingness to pay, any sum which may be a legitimate charge upon the property for the value of the benefit to it by such improvement.

In this case no tender was made of any sum, no offer to pay the amount properly chargeable for benefits, there was no allegation or testimony that the legislative judgment as to the area benefited, or the amount of the benefit was incorrect, or that other property was also benefited, and the opinion goes to the extent of holding that the legislative determination is not only not conclusive but also is not even *prima facie* sufficient, and that in all cases there must be a judicial inquiry as to the area in fact benefited. We have often held the contrary, and I think should adhere to those oft-repeated rulings.

MR. JUSTICE GRAY and MR. JUSTICE SHIRAS also dissented.